No. (1)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

NATIONAL ORGANIZATION FOR WOMEN, INC., on behalf of itself and its women members and other women who use or may use the services of women's health centers that provide abortions; DELAWARE WOMEN'S HEALTH ORGANIZATION, INC.; and SUMMIT WOMEN'S HEALTH ORGANIZATION, INC., on behalf of themselves and all other similarly situated clinics,

Petitioners,

v.

JOSEPH SCHEIDLER, *et al.*,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether, in addition to the statutory "interstate commerce" and injury to one's "business or property" requirements of RICO, RICO should be further limited to cases where either the enterprise or the predicate acts has an overriding economic motive?

2. Whether the Sherman Act contains an implied exemption for all organizations that claim to be espousing a "social cause" when those organizations combine to force lawful businesses from the marketplace, when those organizations are not engaging in protected speech or petitioning, and when no constitutionally-compelled exception to the Sherman Act applies?

PARTIES TO THE PROCEEDINGS AND RULE 29.1 STATEMENT

In addition to the respondent listed in the caption, respondents include John Patrick Ryan; Randall A. Terry; Andrew Scholberg; Conrad Wojnar; Timothy Murphy; Monica Migliorino; Vital-Med Laboratories, Inc.; Pro-Life Action League, Inc.; Pro-Life Direct Action League, Inc.; Project Life; and Operation Rescue.

The parent company of petitioners Delaware Women's Health Organization, Inc., and Summit Women's Health Organization, Inc., is Women's Health Organization, Inc. The National Organization for Women, Inc., has no parent or subsidiary companies.

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PETITION FOR WRIT OF CERTIORARI

The National Organization for Women, Inc., and the plaintiff clinics respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals for the Seventh Circuit is reported at 968 F.2d 612 (7th Cir. 1992), and is reproduced as Appendix A to this Petition. The opinion of the District Court for the Northern District of Illinois, dismissing this lawsuit, is reported at 765 F.Supp.

937 (N.D. Ill. 1991), and is reproduced as Appendix B. The earlier decisions of the District Court, R.42, R.55, R.268, and R.320, holding that the claim for antitrust violations stated a claim, are reproduced as Appendices C, D, E, and F.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals (App. A) was entered on June 29, 1992. A timely petition for rehearing with suggestion for rehearing *en banc* was denied on August 4, 1992 (App. G). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

15 U.S.C. § 1

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

(As amended Dec. 21, 1974, Pub.L. 93-528, § 3, 88 Stat. 1708; Dec. 12, 1975, Pub.L. 94-145, § 2, 89 Stat. 801; Nov. 16, 1990, Pub.L. 101-588, § 4(a), 104 Stat. 2880.)

18 U.S.C. § 1962(c)

It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct

of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

18 U.S.C. § 1962(d)

It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

18 U.S.C. § 1964(c)

Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

STATEMENT OF THE CASE

This civil class action was brought by a group of commercial women's health clinics and a national organization dedicated to protecting women's reproductive rights. The plaintiffs seek relief from a nationwide criminal conspiracy of extremists who use unlawful and violent methods to close clinics that perform abortions and to prevent women from using the services of those clinics. Because the conspiracy was carried out through predicate acts of extortion,[1] relief was sought under the Racketeer Influenced

[1] A 107-page RICO case statement, R.469, detailed hundreds of the predicate unlawful acts on which the claim was based. These include at least 23 acts of arson and attempted arson; 33 fire bombings; 11 acts of destruction of clinic property; 8 assaults and batteries upon clinic staff and personnel; 73 clinic invasions; 311 physical blockades; 383 acts of trespass on private property; 84 acts of harassment; 25 burglaries and thefts; 7 tortious acts of interference with clinics' leases and other contractual relationships; and the theft of 4,000 fetuses from a pathology laboratory used by many of the clinics, coupled with the threat to publicly disclose the names of the women who conceived the fetuses. The Seventh Circuit described defendants' conduct as "reprehensible." App. A-17.

and Corrupt Organization Act ("RICO"), 18 U.S.C. § 1962 *et seq.* Because the conspiracy was designed to—and did—unreasonably interfere with the ability of the women's health clinics to compete in the market for pregnancy-related services, reduced supply in many geographic markets and threatened to do so in others, and because it had succeeded in raising prices to consumers without any countervailing pro-competitive effects, relief was also sought under the Sherman Act, 15 U.S.C. § 1.

Among the defendant conspirators are an anti-choice clinic (Project Life) and several individuals who operate clinics that compete with the plaintiff clinics to provide pregnancy-related services, such as pregnancy testing and counselling.[2] This case is not about a woman's right to abortion; it is about RICO and antitrust.

The complaint did not in any way implicate lawful speech or petitioning by persons opposed to abortions. It attacked only the independently illegal and tortious conduct of the extremists, which the Court of Appeals characterized as "otherwise-criminal." App. A-3 n.4, A-19. While the predicate acts of the co-conspirators sometimes led to their arrest and conviction, a central goal of the conspiracy was to overwhelm local law enforcement resources and render them ineffective. Therefore, the defendants' conduct continued largely undeterred.

Although the District Court's opinion was based primarily on its supposition that the defendants' campaign of terrorism was protected as "petitioning" by the First Amendment, *see* App. B, the Court of Appeals immediately rejected that reasoning because the defendants' objective was not to influence legislation but to destroy the clinics'

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[2] Defendants Wojnar, Scholberg and Terry participate in the operation of such clinics.

business and force them to close. App. A-4.[3] Thus, the *Noerr-Pennington* doctrine could not shield their conduct from antitrust scrutiny, App. A-6, nor could there be any constitutional impediment to relief under RICO. In fact, the Court of Appeals chided the defendants for their "audacity" in suggesting that their campaign of criminal acts was protected as a form of speech. App. A-15.

The defendants include more than just hooligans: several of them own and operate pregnancy-testing and counseling facilities that compete with the plaintiff clinics,[4] and many derive substantial income—in some cases hundreds of thousands of dollars a year—from their enterprises. The lower courts agreed that the conspirators' goal was to lessen competition, App. D-3, and to take away the plaintiff clinics' business and force them to close. App. A-4.

Although most of the co-conspirators were recruited from low-paying jobs, the enterprises that they formed to carry out their goals rapidly became major profit-making businesses that substantially increased the incomes of the defendants and their fellow co-conspirators. R.469 at 17 n.5, 18; Complaint ¶¶ 100-104. Former used-car salesman Randall Terry's 1989 income from the enterprise was over $770,000. R.469 at 18.

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[3] The defendants admitted that their goal was to close clinics and publicly announced that criminal acts were necessary because "pro-life activists cannot wait for the legislative and judicial processes that will make abortion illegal." They vowed to use "any and all means available" to close these health centers. They said that "no clinic will be spared." Complaint (R.236) ¶ 53.

[4] One defendant, Conrad Wojnar, runs a chain of at least five such "women's centers" in the Chicago Area. App. D-2. Project Life, a competing clinic, is run by Randall Terry. Complaint ¶¶ 20, 36.

Despite the fact that the businesses that the conspirators targeted—and, in some cases, closed—are commercial establishments heavily engaged in interstate commerce, and despite the fact that the defendants and their competing, anti-choice clinics amassed hundreds of thousands of dollars from the enterprises they established to eliminate these lawful businesses from the market, the Circuit Court found a lack of "economic motive" in either the enterprise or the predicate acts, and concluded, contrary to Third Circuit precedent, that economic motive is an implicit requirement of RICO. This holding squarely conflicts with *Northeast Women's Center, Inc. v. McMonagle*, 868 F.2d 1342, *cert. denied*, 493 U.S. 901 (1989). Furthermore, because the Seventh Circuit disregarded the objective economic aspects of the defendants' misconduct and required a subjective "economic motive," it deviated severely from the objective "economic dimension" that the Second and Eighth Circuits have looked for in a RICO claim. As for the Sherman Act, the Circuit Court held that even though the defendants had demonstrated their intent and ability to injure consumers by raising costs and reducing the supply of a lawful service, the Sherman Act exempts even criminal organizations if they claim to espouse a "social cause." Such an implied exemption is unprecedented in antitrust decisions of this Court, and directly conflicts with the Eighth Circuit's decision in *Council of Defense v. International Magazine Co.*, 267 F. 390 (8th Cir. 1920).

REASONS FOR GRANTING THE WRIT

I.

THE SEVENTH CIRCUIT'S OPINION, REQUIRING AN ECONOMIC MOTIVE UNDER RICO, CONFLICTS DIRECTLY WITH THE THIRD CIRCUIT AND IS INCONSISTENT WITH OPINIONS OF THE SECOND AND EIGHTH CIRCUITS

The Seventh Circuit's opinion, holding that there is an implicit economic motive requirement in RICO, is in direct conflict with the Third Circuit's decision in *Northeast Women's Center, Inc. v. McMonagle*, 868 F.2d 1342 (3d Cir. 1989), *cert. denied*, 493 U.S. 901 (1989), as the Seventh Circuit conceded, App. A-26. It also deviates substantially from the holdings of the Second Circuit in *United States v. Ferguson*, 758 F.2d 843 (2d Cir.), *cert. denied*, 474 U.S. 1032 (1985), and *United States v. Bagaric*, 706 F.2d 42 (2d Cir.), *cert. denied*, 464 U.S. 840 (1983); and with the Eighth Circuit's in *United States v. Clark*, 646 F.2d 1259 (8th Cir. 1981), and *United States v. Ellison*, 793 F.2d 942 (8th Cir.), *cert. denied*, 479 U.S. 937 (1986), by transforming the requirement that either the predicate acts or the enterprise have some objective "economic dimension" into a requirement that amounts to an overriding and subjective economic motive.

McMonagle was a case both factually and legally similar to this case, although the criminal acts there were directed against a single clinic. The Third Circuit refused to require an economic motive under RICO.[5] It reasoned that the "lack of economic motive does not constitute a defense to Hobbs Act crimes," and since the predicate acts there (as here) were extortion, no economic motive

[5] *See also Feminist Women's Health Center v. Roberts*, No. C86-161, 1988 WL 156656, 11 n.2 (W.D. Wash., March 11, 1988) (refusing to impose an economic motive requirement).

was required. *Id.* at 1348-50, n.7. The Seventh Circuit agreed that the Hobbs Act does not require any economic motive, App. A-32, n.17, and yet it held that an economic motive requirement lurked somewhere in the predicate acts *or* enterprise elements of RICO.

For over a decade this Court has acknowledged the "self-consciously expansive language and overall approach" of RICO, and has stressed that RICO must be "liberally construed to effectuate its remedial purpose." *Sedima S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 497-98 (1985); *see also United States v. Turkette*, 452 U.S. 576, 586-87 (1981). The Court has said that "[t]he fact that RICO has been applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth." *Sedima* at 499. Repeatedly, this Court has stricken decisions attempting to add new elements to RICO, *e.g.*, the "racketeering injury" requirement in *Sedima*; the "organized crime" requirement in *H.J., Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229 (1989); and the "illegitimate association" requirement in *United States v. Turkette*, 452 U.S. at 587. The opinion below acknowledged this Court's admonition "that courts should not graft on additional elements" to RICO, App. A-32; yet it did just that. Here, in the guise of "fleshing out" the definition of either enterprise or predicate acts (the opinion implies that an economic motive for either would suffice), the Seventh Circuit has created a loose, subjective new element for RICO.

Legislative history shows that Congress enacted RICO to remedy the economic *effects* of racketeering activities and the threat that those activities have on domestic security and welfare. Congress knew that racketeering activities have economic effects, regardless of whether they derive from profit-motivated ventures. The concern with economic *effects*—as opposed to motives—is manifested in the *existing* requirements that: (1) the enterprise's ac-

tivities affect interstate commerce, 18 U.S.C. §§ 1962(a) through (d); and (2) the aggrieved plaintiffs suffer injury in their "business or property," 18 U.S.C. § 1964(c).[6] These are the only economic requirements that are true to the text of RICO.

To the extent that an economic element has been read into RICO by the Second Circuit (upon which the Seventh Circuit heavily relied), the requirement is nothing more than "an *objective* appraisal that *some economic purpose* was to be accomplished by the crime charged." *Bagaric*, 706 F.2d at 55.[7] *Bagaric* explained that RICO does *not* demand an inquiry into subjective motives, and expressed discomfort with a "motive" requirement of any sort:

> We purposely highlight our use of the word "motivated." As the text makes clear, we are troubled by the notion, advanced by appellants, that the government will be required to prove the animating or long-run objective of a RICO enterprise was economic, apparently to the exclusion of other, collateral "motives." It is clear that § 1962 does not, by its terms, require proof of ultimate improper economic motive. . . .

Id. at 53. Thus, *Bagaric* "decline[d] to add an element of proof which would hamper the effective implementation of the [RICO] statute," 706 F.2d at 54, requiring only that the offense have some objective "economic dimension," 706 F.2d at 53 n.11. This requirement is both less onerous and more capable of objective determination than "motive."

In *Bagaric*, the Second Circuit found a non-profit Croatian nationalist group liable under RICO, despite the fact that the enterprise lacked an economic motive, because

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[6] The Seventh Circuit acknowledged that the interstate commerce element and economic impact on the plaintiffs' businesses are well pled here. App. A-25, A-34.

[7] Unless otherwise noted, emphasis in quoted materials has been supplied.

"investigation into motive would serve only to politicize, and otherwise inflame, RICO prosecution." *Id.* at 54-55. It pointed out that the defendants there had tried "to inject peripheral political and religious considerations into the trial," and acknowledged that evidence about motives "can only have served to patronize the jury and to add a distracting element of emotionalism to the proceedings." *Id.* Citing a Seventh Circuit opinion authored by Justice (then Judge) Stevens, it agreed that defendants' " 'professed unselfish motivation, rather than a justification, actually identifies a form of arrogance which organized society cannot tolerate.' " 706 F.2d at 54, *citing United States v. Cullen*, 454 F.2d 386, 392 (7th Cir. 1971). With words that would be equally applicable to this case, the Second Circuit warned that an economic motive requirement "would authorize the admission of evidence of political beliefs, racial animosities, and family and blood feuds as justification for criminal acts." 706 F.2d at 55. Because the effect on the national economy is the same regardless of the defendant's motivation, the court stressed that RICO does *not* require proof of a paramount economic motive or "long-term pecuniary objectives." *Id.* at 54-55.

Shortly after *Bagaric*, in *Ferguson*, 758 F.2d at 843, the Second Circuit again steered clear of any subjective "motive" analysis and emphasized that its decision in *Bagaric* "does not stand for the proposition that there must be a *significant* economic purpose for RICO to apply." 758 F.2d at 853 (emphasis in the original). In fact, the court considered the "economic crimes" that the defendant Black Liberation Army had committed there sufficient objective evidence of a financial element to satisfy RICO.

The Seventh Circuit has created a requirement far more demanding—and subjective—than the Second Circuit imposed. Here, there was unquestionably a financial element in the defendants' misdeeds: Terry took in over $700,000

from the enterprise in a single year; Scheidler's Pro-Life Action League made over $100,000 on an annual basis.[8] Furthermore, the defendants ransacked commercial offices, interfered with leases and other commercial contracts, and committed other direct economic crimes against the clinics. Their very purpose was to drive competing clinics out of business and eliminate them from the national economy. This would be more than sufficient under *Bagaric* and *Ferguson*. As the Second Circuit said, "Because we believe Congress, and the traditions of our criminal law, contemplate trials free of consideration of such issues, we reject appellants' argument that economic motive must surmount all others." 706 F.2d at 55.

The Seventh Circuit's decision also clashes with the Eighth Circuit's in *Clark*, 646 F.2d 1259, which found a RICO violation by a governmental agency that had no economic goal, and with *Ellison*, 793 F.2d 942, which affirmed the RICO convictions of a white Christian supremacist group that lacked an economic motive. (The defendants there committed religiously-motivated acts of arson that resulted in no financial benefits to the enterprise. *Id.* at 950.)

While the Second and Eighth Circuits appear to require that economics play *some* role in the RICO violation, this element is amply satisfied here. The complaint and RICO case statement show that the defendants made a large and profitable business from their conspiracy and wreaked economic injury on the clinics and their clients. This is

[8] The financial aspects of the defendants' enterprises also include extravagant "consulting fees," travel expenses, company cars, and other benefits for the defendants and their families. R.469 at 21-22. Their sources of income include the sale of books, video tapes and the presentation of work shops on how to break the law and get away with it. These organizations have salaried employees, telephones, bank accounts, letterhead stationery, receptionists, secretaries, accountants, and a host of consultants—all the accoutrements of commercial businesses.

the very type of harm condemned by RICO because it "seriously burden[s] interstate . . . commerce, threaten[s] the domestic security, and undermine[s] the general welfare of the Nation and its citizens." Statement of Findings and Purpose, Pub.L. 91-452, 84 Stat. 922 (1970), 91st Cong., 2d Sess., reprinted in 1970 U.S. Code Cong. & Admin. News 1073. As the Second Circuit explained in *Bagaric*, a RICO enterprise need not be profit-motivated to affect the national economy:

> The situation reached by § 1962 may thus not always be one in which the enterprise "makes money" for its members. Yet, even absent a requirement that the enterprise be a profit-making one, the section implements the principal congressional purpose, . . . [S]ince non-profit corporations (as well as entirely illegitimate associations of individuals) compete within the economy for funds and services, it would have been counter-productive to exempt from the statute those invested in, acquired, or maintained through a pattern of racketeering activity.

Id. at 56 (citations omitted).

The Seventh Circuit seriously erred—and created a dangerous precedent—in imposing a subjective and onerous "motive" requirement. Its conclusion that "non-economic crimes committed in furtherance of non-economic motives are not within the ambit of RICO," App. A-32, flings the door wide open for defendants to evade RICO liability simply by claiming their misdeeds had no overarching economic motive. If the decision is allowed to stand, it will turn every RICO trial into a free-for-all where evidence about defendants' subjective motives overwhelms the fact-finding tribunal. RICO already requires an impact on the nation's economy and injury to the plaintiff's business or property. There is simply no need to inject new economic requirements into RICO's "enterprise" or "predicate acts" provisions, as the Seventh Circuit has done here. The

Seventh Circuit's opinion has created a direct conflict with the Third Circuit and a major inconsistency with Second and Eighth Circuit decisions.[9] A writ of certiorari should be issued to resolve this conflict.

II.

THE SEVENTH CIRCUIT HAS ALSO CREATED AN UNPRECEDENTED "MOTIVE" DEFENSE TO THE SHERMAN ACT

A. This Court and the Courts of Appeals Have Consistently Rejected "Good Motives" As a Defense to Antitrust Claims

The judicial creation of exemptions from the Sherman Act based on a court's subjective view of what is socially desirable has been condemned time and again by this Court. The Seventh Circuit's opinion is unprecedented in allowing private parties to obstruct competition if they can persuade the court that their true motivation has to do with a "social cause." In the landmark opinion, *United States v. Addyston Pipe*, 85 F. 271, 284 (6th Cir. 1898), *aff'd.*, 175 U.S. 211 (1899), Judge William Howard Taft explained that some misguided courts have assumed the power to determine "how much restraint of competition is in the public interest, and how much is not." He condemned such an undertaking as setting "sail on a sea of doubt." *Id.* Cognizant of the courts' proper role, Judge Taft warned that "[t]he manifest danger in the administration of justice according to so shifting, vague, and indeterminate a standard would seem a strong reason against adopting it." *Id.*

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[9] In his dissent from the denial of *certiorari* in *McMonagle*, Justice White noted the apparent conflict between the Third Circuit's refusal to require any economic motive and the Second and Eighth Circuits' requirement of an economic "element." 493 U.S. 901 (1989). The Seventh Circuit's holding creates a square conflict with the Third Circuit's, at the very least.

This Court, too, has long refused to consider defendants' "good motives" as a defense to the Sherman Act.[10] In *Board of Trade v. United States*, 246 U.S. 231, 238 (1918), Justice Brandeis said that a defendant's purpose may be relevant, "not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences." The Court has repeatedly announced that implied exemptions from § 1 are strongly disfavored.[11] In *N.C.A.A. v. Board of Regents*, 468 U.S. 85, 101 n.23 (1984), the Court declared that while "the N.C.A.A.'s motives must be accorded a respectful presumption of validity, *it is nevertheless well settled that good motives will not validate an otherwise anticompetitive practice.*" It held that non-profit organizations may be liable for restraining trade even if they sincerely believe that what they are doing is important to some worthy goal. In *National Society of Professional Engineers v. United States*, 435 U.S. 679 (1978), this Court reaffirmed Judge Taft's hesitation to embark on this "sea of doubt,"

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[10] In *United States v. Joint-Traffic Ass'n.*, 171 U.S. 505 (1898), and *United States v. Trans-Missouri Freight Ass'n.*, 166 U.S. 290 (1897), the defendants offered plausible policy arguments about how their agreements were necessary to avoid ruinous competition in their industry. Yet this Court unequivocally declared that courts are not in the business of making the socio-political and economic judgments necessary to determine whether competition is appropriate for an industry.

[11] *United States v. Philadelphia National Bank*, 374 U.S. 321, 350 (1963) (the repeal of the Sherman Act by implication is strongly disfavored); *United States v. First City National Bank of Houston*, 386 U.S. 361, 368 (1967) ("immunity from antitrust laws 'is not lightly implied' ") (quoting *California v. Federal Power Commission*, 369 U.S. 482, 485 (1962)); *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 787 (1975) ("Congress intended to strike as broadly it could with § 1 of the Sherman Act"); *Lafayette v. Louisiana Power and Light Co.*, 435 U.S. 389, 399 (1978) (there is a presumption against implied exclusions).

stressing that the judicial role does not lend itself to the *ad hoc* balancing necessary to determine whether defendants should be able to restrict the provisions of lawful services to consumers in the marketplace. 435 U.S. at 696. The only valid consideration is whether the challenged conduct enhances or diminishes competition. Here, of course, there are absolutely no pro-competitive benefits from the defendants' conspiracy.

Goldfarb v. Virginia State Bar, 421 U.S. 773, 786-88 (1975), too, rejected the "good motives" defense when it refused the bar association's request to exclude lawyers from antitrust regulation because they are a "learned profession" and have a "public-service aspect" to their work. The Court held that "the nature of a profession . . . does not provide sanctuary from the Sherman Act," and emphasized that, because the language of § 1 contains no exceptions, even meritorious services in the public interest are subject to antitrust regulation. *Id. See also F.T.C. v. Indiana Federation of Dentists*, 476 U.S. 447, 462 (1986) (rejecting dentists' "moral and ethical policy of quality dental care" argument as defense to restraint on trade).

Four years ago, this Court again pointed out the dangers of considering "social" motives in a Sherman Act case. Even though the defendants in *Allied Tube and Conduit Corp. v. Indian Head*, 486 U.S. 492 (1988), argued that their conduct was motivated by the public interest and "a genuine belief that plastic conduit was unsafe," 486 U.S. at 498, the Court warned that if "social" objectives conferred antitrust immunity, any company could claim immunity on the ground that it intended to dramatize the plight of its industry and spur government action. *Id.* at 503. Similarly, in *F.T.C. v. Superior Court Trial Lawyers' Ass'n.*, 493 U.S. 411 (1990) ("*D.C. Lawyers*"), this Court dismissed the defense that a boycott was justified by the "public interest in obtaining better representation for in-

digent defendants," *id.* at 419, a cause that the majority of the Court acknowledged was worthwhile. The Court again stressed that good motives can *never* be a defense to antitrust claims:

> [I]nsofar as respondents seek immunity from prosecutions *on the basis of their good intent*, their theory of defense "is merely another variety of an age-old argument." *See United States v. Cullen*, 454 F.2d 392 (7th Cir. 1971).

493 U.S. at 428 n.11.

The rejection of the "good motives" defense makes sense in a free market economy. As the Court explained in *N.C.A.A.*:

> Congress designed the Sherman Act as a "consumer welfare prescription," (citing *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979)). A restraint that has the effect of reducing the importance of consumer preference in setting price and output is not consistent with this fundamental goal of antitrust law.

468 U.S. at 107. Here, the defendants' conspiracy has violated this well-settled principle by denying consumers the right to choose from a full range of lawful reproductive health services and by denying health care professionals and business owners the right to earn their living at clinics that provide those services.

In his antitrust treatise, *The Antitrust Paradox*, at 105 (1978), Professor Bork explained how our free market economy is based on the premise that consumers will define their own welfare. The antitrust laws are designed to let them do that, with providers of lawful services free to compete with others to provide consumers with the services they choose. When people conspire, by unprotected means, to drive businesses from the market and to deprive consumers of the unrestricted range of services, they interfere with the free market and the antitrust laws

are implicated. This is precisely what the defendants have done here.

The antitrust decisions of this Court, as well as of the courts of appeals, teach that parties who believe that a particular consumer good or service is undesirable may speak out peaceably or seek governmental regulation to curtail its use. Here, defendants claim that a free marketplace that provides a full range of reproductive services is socially undesirable. They contend that only *their* brand of pregnancy-related counselling and support services should be permitted and that clinics that also offer abortion should be banned. If this is their belief, they have two legitimate avenues of recourse: (1) lawful petitioning of the government to ban the service of which they disapprove; and (2) lawful speech designed to persuade consumers to choose their services instead of those of clinics that also offer abortion. The complaint here alleges in great detail that the defendants' conspiracy went far beyond these two lawful activities. The antitrust laws prohibit the defendants from engaging in conspiracies to restrain trade by forcing their competitors out of the marketplace and denying consumers free choice.

The Seventh Circuit's opinion, exempting from the Sherman Act any party who claims to be espousing some "social cause," directly conflicts with the long-standing opinion of the Eighth Circuit in *Council of Defense v. International Magazine Co.*, 267 F. 390 (8th Cir. 1920), as well as with 100 years of antitrust jurisprudence of this Court. Furthermore, if its decision is allowed to stand, it will introduce a new and hopelessly unmanageable element into both the discovery and the trial of cases that many courts regard as complex enough already.

Council of Defense involved the boycott of the Hearst newspapers to protest Hearst's pro-German stance during the war. The "declared and obvious purpose" of the boy-

cott "was to destroy [Hearst's] business." 267 F. at 411. Protected speech was not implicated, and the boycott, despite its purely political motivation, was found illegal under the antitrust laws. Plainly and simply, the Eighth Circuit held that sincere social or political motives are no defense to a § 1 claim. The Seventh Circuit's decision squarely conflicts with this holding.

The Seventh Circuit claimed to find support for its disagreement with *Council of Defense* in *N.A.A.C.P. v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), and in another Eighth Circuit decision, *Missouri v. NOW*, 620 F.2d 1301 (8th Cir.), *cert. denied*, 449 U.S. 842 (1980). However its reasoning does not withstand scrutiny. *Claiborne* held that the *peaceful* aspects of a consumer boycott are protected under the First Amendment, but expressly pointed out that the defendants' *illegal* and *violent* acts are not. *Id.* at 933. Here, the Seventh Circuit advised that it was "audacious" to suggest that the defendants' criminal and tortious acts are entitled to any protection under the First Amendment. The complaint here simply does not trench on protected activities:

> [The *NOW v. Scheidler* complaint] does not attempt to bar all anti-abortion activities. Peaceful picketing, debate, meetings, prayers, and a host of other forms of peaceful protest, are protected by the First Amendment. The complaint seeks relief from criminal and tortious activities, such as trespass, clinic invasion, vandalism, extortion, and tortious interference with business relationships.

App. A-6. For these reasons, *Claiborne* offers no support for the exemption the Seventh Circuit created.

The Eighth Circuit's decision in *Missouri* (which cited *Council of Defense* approvingly, *see* 620 F.2d at 1304 n.4) also offers no support for the Seventh Circuit's exemption. *Missouri* found that the legislative history of the

Sherman Act did *not* support a "good motives" exemption:

> Unfortunately, an examination of the legislative history does not clearly indicate the answer to the question we have here—whether Congress wanted to protect "free and fair" competition from political or social activities that can have the same effect upon competition as the commercial activities of a trust against a business.

620 F.2d at 1305. Like *Claiborne*, *Missouri* held that the First Amendment protects the peaceful aspects of a consumer boycott aimed solely at persuading the legislature to ratify a constitutional amendment. This is a far cry from the Seventh Circuit's holding that criminal acts aimed at destroying competitors' businesses are immune from antitrust laws if the conspirators wrap themselves in some "social cause." In fact, *Missouri* expressly disavowed the rule that the Seventh Circuit tries to attribute to it. *Missouri* declared that its decision did *not* rest "upon the basis that the boycott was non-commercial or non-economic . . . [but was] based upon the right to use political activities to petition the government." 620 F.2d at 1315 n.16. Thus, the Seventh Circuit's far-reaching new exemption finds no support in *Missouri*, either.[12]

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[12] The Seventh Circuit also claimed to find support in *Marjorie Webster Junior College, Inc. v. Middle States Ass'n. of Colleges and Secondary Schools, Inc.*, 432 F.2d 650 (D.C. Cir.), *cert. denied*, 400 U.S. 965 (1970), which held that enforcement of a rule limiting accreditation to non-profit schools was only an "incidental restraint on trade" that was "not sufficient to warrant application of the antitrust laws." *Id.* at 654. The court there noted that the accreditation process was "an activity distinct from the sphere of commerce." *Id.* at 655. The same cannot be said of the business of the women's health centers in this case, because they are integrally involved in interstate commerce. The Seventh Circuit's only other authority, *Council for Employment and Economic Energy Use v. WHDH Corp.*, 580 F.2d 9 (1st Cir. 1978), *cert.*

(Footnote continued on following page)

Ironically, it is an earlier case from the Seventh Circuit, *Wilk v. American Medical Ass'n.*, 719 F.2d 207, 211 (7th Cir. 1983), *cert. denied*, 467 U.S. 1260 (1984), that illustrates just how unworkable a "social cause" exception to the Sherman Act would be. In *Wilk*, thinking that motives were a relevant inquiry, the trial court allowed testimony about the AMA's subjective "social motives." The AMA claimed its restraint of trade was motivated by concern for "patient care," and it was prepared to prove its "genuine belief" that "chiropractic is dangerous quackery." The AMA maintained that it was motivated only by a sincere concern for "public health, safety and welfare." *Id.* at 216. This evidence led to an extremely lengthy trial and nearly turned it into a circus. Reversing the lower court, the Seventh Circuit explained that "the upshot of all this was much of the trial, and virtually all of the parties' arguments to the jury, were a free-for-all," with the defendants trying to prove the "depth and sincerity" of their beliefs, while the plaintiffs questioned the single-mindedness of these motives. *Id.* at 216.

Wisely, on appeal the Seventh Circuit rejected the AMA's attempt to offer its good motives as a defense to the Sherman Act and stressed how unmanageable antitrust cases would become if courts allowed a "good motives" defense. Such a subjective standard also gives far too much discretion to the trial judge or jury to determine which motives are "good" and which are "sincere." Unfortunately, in this case, the Seventh Circuit forgot what it had stressed in *Wilk*. It also failed to heed its own rule that "the highly factual and subjective questions

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[12] *continued*

denied, 440 U.S. 945 (1979), is also readily distinguishable because it involved classic petitioning—a referendum and radio time to speak out about it. Thus, the restraint was protected under *Eastern Railroad Presidents Conference v. Noerr Motor Freight Co., Inc.*, 365 U.S. 127 (1961).

of intent and purpose should be resolved [only] after discovery and trial." App. A-7, *citing Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101, 1106 (7th Cir. 1984), *cert. denied*, 470 U.S. 1054 (1985).

Justice Rehnquist has frequently reminded lawyers of the need to avoid protracted litigation that delays justice and unnecessarily ties up the courts. A "good motives" exemption to the Sherman Act would force parties to engage in intrusive and burdensome discovery of the defendants' finances, beliefs, personal associations, and a host of other subjective matters. It would open a Pandora's box of discovery and turn trials into "free-for-alls," as in *Wilk*. The ramifications of the Seventh Circuit's decision are daunting. This Court should grant a writ of certiorari to prevent the spread of such litigation nightmares.

In sum, the Seventh Circuit's opinion directly conflicts with the Eighth Circuit's holding in *Council of Defense*, and would call for the implicit overruling of numerous decisions of this Court, including *D.C. Lawyers*, *Allied Tube*, *Goldfarb*, *Federation of Dentists*, *Professional Engineers*, and *N.C.A.A.*. If allowed to stand, it would start the courts on the slippery slope of evaluating motives and their sincerity. Evidence in antitrust cases would be wildly multiplied by defendants trying to prove their altruistic social, religious, moral, and political motives, while plaintiffs tried to show that the defendants were less than sincere. Two-week trials would stretch to ten weeks; worse, three-month discovery periods would become three years.

B. The Sherman Act is Concerned with Objective Effects on Commerce and Consumers, Not with Subjective Motives of the Defendants

The Circuit Court expressed some concern about whether the defendants were "involved in business," App. A-16,

and questioned whether they were "exercising market power" to harm the clinics' business. *Id.* at A-19. It apparently overlooked the well-pled fact that the conspirators included business competitors, such as Project Life, and the owner/operators who run clinics that directly compete with the plaintiff clinics to provide pregnancy-related services. The Circuit Court also incorrectly concluded that the defendants did not control supply.

In *Federation of Dentists*, 476 U.S. at 460-61, this Court explained that the ability to drive up prices and restrict output establish market power. It said:

> Since the purpose of the inquiries into market definition and market power is to determine whether an arrangement has the potential for genuine adverse effects on competition, *"proof of actual detrimental effects, such as reduction of output," can obviate the need for inquiry into market power*, which is but a "surrogate for detrimental effects."

476 U.S. at 460-61. *See also United States v. duPont*, 351 U.S. 377, 391 (1956) (market power is shown by the ability to restrict output or raise costs). In *N.C.A.A.*, 468 U.S. at 107, too, the Court stated that anti-competitive effects such as increased prices and restricted output, which are unresponsive to consumer preference, are inconsistent with the fundamental goal of antitrust law. Increased costs and restricted output establish market power.[13] Both of these factors are established in this case, as is their effect upon consumers. The complaint directly alleges the defendants' power in the market: they have driven clinics out of a number of markets and raised costs everywhere.[14]

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[13] Even the Seventh Circuit recognized that would-be monopolists who try to injure competitors by raising their rivals' costs are subject to the antitrust laws. App. A-19 n.13.

[14] The defendants' methods included direct threats and physical attacks on clinic personnel; making phony appointments to pre-

(Footnote continued on following page)

Complaint ¶¶ 86, 87. They target the low-cost providers of these services; where they are successful, the market is severely restricted, and only hospital abortions remain available, at two to five times the price. *Id.* ¶ 8. They have targeted every clinic nationwide, beginning in the most concentrated geographic markets. *Id.* ¶¶ 44-45, 85. They have shown their ability to assemble thousands willing to risk arrest and conviction to interfere with these businesses' operations. They have admitted publicly that their tactics had been successful in some geographic markets.[15] Their acknowledged goal is to lessen competition and eliminate the availability of this lawful consumer service. This is antitrust injury under *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977).

In a factually similar case, *Northeast Women's Center, Inc. v. McMonagle*, 624 F.Supp. 736 (E.D. Pa. 1985), the court held that even a single clinic could sue under the antitrust laws against a conspiracy to drive it out of business. *McMonagle* noted that "the essence of competition covered by the Act is that choices be preserved," 624 F.2d at 740. Citing *United States v. Realty Multi-List, Inc.*, 629 F.2d 1351, 1364 (5th Cir. 1980), it held that ". . . A practice is 'plainly anticompetitive' . . . under the Sherman Act . . . when it operates to deny the consumers the opportunity to choose among alternative offers without offering the possibility of any joint, efficiency-producing eco-

[14] *continued*
vent real consumers from getting appointments; tying up clinic phone lines; extorting clinics' suppliers, landlords; and interfering with other business contracts. *E.g.*, Complaint ¶¶ 2, 37, 77, 125.

[15] Furthermore, it is well established that a party need not wait until it is driven out of the market before seeking a remedy under the Sherman Act. *E.g., Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 112 n.8 (1986). Nonetheless, the elimination of all competing clinics in certain geographic markets was pled in the complaint.

nomic activities." 624 F.2d at 740. Here, as in *McMonagle*, there are absolutely no pro-competitive benefits that flow from the defendants' unlawful acts. The avowed purpose and effect are to eliminate consumer choice. This strikes the very core of the antitrust laws because "Congress designed the Sherman Act as a 'consumer welfare prescription.' " *Reiter*, 442 U.S. at 343. Because a conspiracy based on "good motives" can interfere with free trade and consumer interests just as surely as one based on selfish ones, the Sherman Act is concerned with *effects* on business and commerce, not with the conspirators' *motives*.

The circuit court for the District of Columbia in *Kreuzer v. American Academy of Periodontology*, 735 F.2d 1479 (D.C. Cir. 1984), explained that in addition to economic self-interest, a conspiracy may very well be used "to advance a group's social and moral objectives unrelated to the business and economic interest." Nevertheless, "[w]hatever the group's intent (and no matter how genuinely held), a boycott, if successful, may nonetheless injure the victim of the boycott and often thereby injure competition." 735 F.2d at 1493. The same court in *Costello Publishing Co. v. Rotelle*, 670 F.2d 1035 (D.C. Cir. 1981), refused to find immunity for an agreement to limit competition in liturgical books when the defendants asserted a purely religious motivation. In an earlier case, the Seventh Circuit itself wrote, "it is effect or consequences which controls, not intent." *Wilk*, 719 F.2d at 225.

Here the complaint alleges concerted unlawful intimidation and extortion designed to prevent health care professionals and their clients from participating in a free marketplace for reproductive services. Antitrust law requires that such conduct must be condemned, regardless of the defendants' intent. The underlying principle of all the relevant case law is that anti-competitive *effect*, not motive, is the key to antitrust liability. Here, the anti-

competitive effect is undisputed. There is simply no principled basis on which to distinguish socially-motivated conspiracies that restrain trade from those that are not so motivated. Allowing defendants to justify their anti-competitive conduct by asserting social or political rationalizations will unduly lengthen and complicate antitrust litigation and make it easier for wrongdoers to interfere with the free enterprise system to the detriment of consumers. Absent constitutional considerations, broadening of an antitrust exemption for "socially-motivated" activities is wholly unwarranted.

C. The Seventh Circuit Erred Profoundly in Both Its Reliance Upon and Its Reading of Legislative History

In *West Virginia University Hospitals v. Casey*, ___ U.S. ___, 111 S.Ct. 1138, 1147 (1991), Justice Scalia said that courts must interpret the *text* of a statute, not some elusive legislative intent. "Judges interpret laws rather than reconstruct legislators' intentions. Where the language of those laws is clear we are not free to replace it with an unenacted legislative intent." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 452-53 (1987) (Scalia, J., concurring). Despite this admonition, and recognizing the dangers of searching for a "legislative intent" (this should be particularly true of a statute that has been on the books for a century), the Seventh Circuit looked to the legislative history of the proposed "temperance" amendments to the Sherman Act, *which were never enacted*, to support its unprecedented holding that violent activities, if undertaken in the name of a "social cause," are free from antitrust scrutiny.

Only by several leaps of logic did the Seventh Circuit reach its conclusion. It reasoned as follows: first, some temperance crusaders engaged in violence. Second, Congress was "undoubtedly" aware of this violence since it

was reported in the press at the time. Third, some senators argued for limitations on the Sherman Act to exclude lawful speech of the *peaceful* temperance crusaders and to exclude the efforts of temperance crusaders to *persuade the government* to pass temperance laws.[16] Therefore, according to the Seventh Circuit's reasoning, even though those amendments to the Sherman Act were never enacted, Congress must have meant to exclude from the Sherman Act's coverage all violent acts, not only of temperance crusaders, but also of every other group that claims to be espousing a social cause.

There are fundamental difficulties with this logic. First, the fact that the violent acts of some extremist temperance crusaders may have made the history books does not establish that Congress knew about it. Second, the fact that some violence occurred does not prove that Congress cared to shield violent acts from federal regulation. Even though some senators wanted to protect peaceful acts of the temperance crusaders, it does not follow that they wanted to protect violent conduct as well. Third, the amendments were never passed. The Sherman Act was never amended to exempt people who crusaded for temperance (and it was certainly never amended to exempt those who crusaded violently). The debate in Congress over whether it would violate the Sherman Act if citizens

[16] The senators proposing the amendments apparently believed that even the peaceable temperance crusaders may have been subject to liability under the Sherman Act. Even putting aside the *Noerr* and First Amendment limitations, however, it is questionable whether the temperance crusaders' local consumer boycotts would have been considered part of "commerce" at the time of the debates. Indeed, the prevailing definition of "commerce" was so narrow that in *United States v. E.C. Knight Co.*, 156 U.S. 1 (1895), the Court held that "manufacturing" was not encompassed by the term "commerce" in the Sherman Act; it was not until *Mandeville Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219 (1948), that this narrow view was finally rejected.

agreed not to drink liquor, tried to persuade others not to drink liquor and tried to pass prohibition legislation foreshadowed the recognition by the courts of certain *constitutional* limits to Congress's power in § 1—primarily those imposed by the First Amendment.[17] Thus, the excerpts of legislative history that the Seventh Circuit cites, expressing concern for "belonging to or joining a temperance organization," and "making an agreement . . . between citizens . . . not to drink . . . and to persuade others in a similar abstention," App. A-9, are exercises of free speech and association that are protected by the First Amendment. There is not a speck of legislative history to support the Seventh Circuit's conclusion that violent and unlawful acts of the temperance crusaders or anyone else were intended to be exempt from the Sherman Act. All the examples given by Senator George and other Sherman Act opponents involved *lawful* speech, association and petitioning for the passage and enforcement of laws.

The Seventh Circuit expressed some concern that if this conspiracy were subject to the Sherman Act, so would the conspiracies of groups like Earth First! *See* App. A-17. If Earth First! unreasonably restrained trade and a logging company sued to enjoin it, we see no principled reason why Earth First! should be exempted either, unless Congress makes the decision to exempt it. A similar argument was made in *Patrick v. Burget*, 486 U.S. 94 (1988), where this Court refused to exempt a hospital peer re-

[17] The debaters' concern for organizations formed "for the purpose of laws being passed," App. A-10, is exemplified by the *Noerr-Pennington* cases, which, as the Seventh Circuit correctly explained, limit regulation of legitimate petitioning activity. The concerns were also exemplified by *Claiborne*, which makes clear that, unlike violent and unlawful activity, *peaceful* speech is protected from Sherman Act regulation by the First Amendment.

view committee from § 1 because Congress had not seen fit to exempt it.[18] It said, "[I]f physicians believe that the Act provides insufficient immunity to protect the peer review process fully, they must take that matter up with Congress." 486 U.S. at 105 n.8. The same should apply to Earth First!, Operation Rescue extremists and every other group that offers a "social" reason as its only excuse for engaging in an unreasonable restraint of trade.

Even though the judges in the court below indicated their personal disdain for the defendants' conduct, their opinion makes clear that they felt that they should not apply the Sherman Act to this case. As this Court's opinion in *Patrick* teaches, that decision is not for courts to make but for Congress. The Seventh Circuit's rationale for its new Sherman Act exemption is an egregious example of misusing historically unreliable materials to reach a preordained result.

If left uncorrected, the Seventh Circuit's opinion, which rests on rocky legislative-history footing, will set disastrous precedent and will call into question every decision of this Court and of the courts of appeals that has addressed the question whether the offer of "good motives" can immunize anti-competitive conduct. A writ of certiorari must issue to resolve the conflict in the circuits, to correct the conflict with precedent of this Court, and to prevent the introduction of an element that would make antitrust trials even more unwieldy than they already are.

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[18] In fact, Congress did pass a limited exemption for peer review committees that protects them from private antitrust actions under a well-specified set of circumstances. *See* 42 U.S.C. §§ 11111(a)(1) and 11112(a) (1986).

CONCLUSION

For all the reasons stated above, a writ of certiorari should be issued to review the judgment and opinion of the Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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APPENDICES

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 91-2468

NATIONAL ORGANIZATION FOR WOMEN, INC., on behalf of itself and its women members and other women who use or may use the services of women's health centers that provide abortions, DELAWARE WOMEN'S HEALTH ORGANIZATION, INCORPORATED and SUMMIT WOMEN'S HEALTH ORGANIZATION, INCORPORATED, on behalf of themselves and all other similarly situated clinics,

Plaintiffs-Appellants,

v.

JOSEPH M. SCHEIDLER, JOHN P. RYAN, RANDALL A. TERRY, ANDREW SCHOLBERG, CONRAD WOJNAR, TIMOTHY MURPHY, MONICA MIGLIORINO, VITAL-MED LABORATORIES, INC., PRO-LIFE ACTION LEAGUE, INC., PRO-LIFE DIRECT ACTION LEAGUE, INC., PROJECT LIFE, and OPERATION RESCUE,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 86 C 7888—**James F. Holderman**, *Judge.*

ARGUED FEBRUARY 19, 1992—DECIDED JUNE 29, 1992

Before BAUER, *Chief Judge*, CUMMINGS, *Circuit Judge*, and VAN SICKLE, *Senior District Judge*.[1]

BAUER, *Chief Judge*. The plaintiffs, the National Organization for Women, Inc. ("NOW"), the Delaware Women's Health Organization, Inc. ("DWHO"), and Summit Women's Health Organization, Inc. ("SWHO"), brought this action seeking federal relief from the defendants' nationwide campaign to close medical clinics that provide abortion services. The second amended complaint[2] alleges violations of the Sherman Antitrust Act, 15 U.S.C. § 1, and the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1962(a), (c), and (d) ("RICO"). The complaint also raises several pendent state claims. The district court granted the defendants' motion to dismiss the complaint under F.R.C.P. 12(b)(6). *National Organization for Women v. Scheidler*, 765 F. Supp. 937, 945 (N.D. Ill. 1991).

The plaintiffs appealed. We reluctantly affirm the dismissal of the plaintiffs' claims for two reasons. First, we find that the antitrust laws were not intended to apply to the defendants' activities. Second, we hold that RICO requires either an economically motivated enterprise or economically motivated predicate acts.

I. Factual Background

The plaintiffs (a national non-profit organization aimed at advancing and protecting women's rights, and two women's health centers[3]), claim that the defendants, anti-abortion

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[1] The Honorable Bruce M. Van Sickle, Senior Judge of the United States District Court for the District of North Dakota, is sitting by designation.

[2] For purposes of simplicity, we shall refer to the second amended complaint (Record Document 236) in text as "the complaint."

[3] NOW sought class certification for itself, its women members who use or may use the targeted health centers, and other women who use or may use the services of such centers. The health-center plaintiffs sued on behalf of themselves and all other similarly-situated centers performing abortions. The district court did not

(Footnote continued on following page)

activists, anti-abortion groups, and a medical testing laboratory, engaged in a conspiracy to close all women's health centers providing abortions through a pattern of illegal activity. The complaint alleged that the defendants (other than Vital-Med Laboratories) engaged in the following illegal[4] activities in order to close women's health centers that perform abortions: extortion; physical and verbal intimidation and threats directed at health center personnel and patients; trespass upon and damage to center property; blockades of centers; destruction of center advertising; telephone campaigns designed to tie up center phone lines; false appointments to prevent legitimate patients from making them; and direct interference with centers' business relationships with landlords, patients, personnel, and medical laboratories.[5] Many of these activities were organized by a coalition of anti-abortion groups called the Pro-Life Action Network ("PLAN"). The defendants who have participated in PLAN activities, the "PLAN defendants" are Scheidler, Ryan, Terry, Scholberg, Murphy, Wojnar, Migliorino, Pro-Life Action League ("PLAL"), Pro-Life Direct Action League ("PDAL"), Operation Rescue ("OR"), and Project Life.

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[3] *continued*
certify either class, apparently deferring its ruling until resolution of the motions to dismiss. *See* Minute Order of 1/08/88. All pending motions were dismissed as moot when the court granted defendants' motion to dismiss. *See National Organization for Women v. Scheidler*, 765 F. Supp. 937, 945 (N.D. Ill. 1991).

[4] When we use the terms illegal and unlawful to describe the defendants' activities, we refer not to violations of RICO or the antitrust laws, but to acts that are otherwise unlawful, such as trespass and vandalism.

[5] The district court also found that the defendants, in particular Scheidler, have links with arsonists who have fire-bombed health centers. The court also found that the defendants have not condemned fire-bombing. The court made these findings after defendant Wojnar moved for Rule 11 sanctions based upon the plaintiffs' allegation of the association in a pleading. *See Denial of Defendant Wojnar's First Motion for Sanctions*, March 27, 1992.

More specifically, the complaint alleges that defendant Scheidler distributes Closed: *99 Ways to Stop Abortion*, a manual which advocates unlawful methods of interfering with the operations of women's health centers. Employing the methods detailed in the manual, defendants Scheidler, Ryan, Terry, Scholberg, Murphy, and Migliorino have spearheaded actions throughout the country aimed at closing health centers. For example, in March 1986, Scheidler, Ryan, PLAL, and PDAL, led others (alleged to be their co-conspirators) in an invasion of a health center in Florida. Protestors entered the center, and injured the center's administrator and another woman, the medical procedures room was ransacked, and medical supplies were destroyed. The participants who stormed the center were convicted on criminal charges.

Other demonstrations organized by defendants involved hundreds of individuals who blockaded clinics. During these "blitzes," as they are called, defendants' groups, using a method called "lock and block," pour glue into clinic locks, and individual protestors lock themselves to clinic doors. Another tactic involves abrasive confrontations with women seeking abortions, designed, according to a news release prepared by defendants, to take away the centers' business. The complaint details many other invasions of clinics, and in one case, a judge's home, involving injuries, trespass, and vandalism. Often these demonstrations resulted in the arrests of hundreds of demonstrators, including defendants, for state criminal law violations. For example, defendant Ryan has been arrested more than three hundred times; defendant Scheidler has been convicted and fined for criminal trespass and harassment. We note that the complaint does not purport to catalog all of the defendants' arrests and criminal convictions.

The plaintiffs also allege that two of the defendants (Wojnar and Terry) have established competing pregnancy testing and counseling facilities.

Defendant Vital-Med Laboratories, an Illinois corporation, provided pathology testing and safe, sanitary disposal

services to DWHO, SWHO, and other affiliated clinics. Plaintiffs allege that Vital-Med participated in a conspiracy to steal fetal remains from Vital-Med's Northbrook, Illinois laboratory. In January 1988, defendant Wojnar was contacted by a Vital-Med employee who detailed a scheme for stealing fetal remains from the laboratory. Over a ten-month period, in conspiracy with one or more Vital-Med employees, defendants Murphy and Migliorino stole approximately 4,000 aborted fetuses from the laboratory. Murphy and Migliorino each entered Vital-Med's Northbrook laboratory, opened sealed storage drums containing a variety of medical waste, and removed fetal specimens. On at least one occasion, an entire storage drum was stolen. Vital-Med employees, who saw Murphy and Migliorino on at least one occasion, did nothing to stop the thefts.

The remains were stored at the homes of Scheidler, Murphy, Migliorino, and Wojnar. Scheidler kept the storage drum in a playhouse in his backyard for several weeks. After the fetal remains were removed, Murphy dumped the drum containing the remaining medical waste in a dumpster in Chicago. Remains were sent to anti-abortion activists in Indiana, North Carolina, North Dakota, Delaware, and Florida. Activists eventually held mass burial services for the fetuses in several states. Scheidler announced to news media that the fetuses had been found at a Chicago laboratory and that they were "individually packaged and labelled . . . with the names of the mothers, doctors, dates and places the abortions were performed." Second Amended Complaint, R. 236 at 24. Vital-Med no longer accepts fetal remains for testing.

Finally, defendants contacted businesses that provide goods and services to health centers and threatened to disrupt and harass them if they continued to transact business with the centers. When SWHO arranged a move to new premises, defendant Migliorino threatened SWHO's future landlord and co-tenants. The landlord terminated the lease.

We note here that the complaint does not attempt to bar all anti-abortion activities. Peaceful picketing, debate, meetings, prayers, and a host of other forms of peaceful protest, are protected by the First Amendment. The complaint seeks relief from criminal and tortious activities such as trespass, clinic invasion, vandalism, extortion, and tortious interference with business relationships.

Moreover, the complaint does not allege that the defendants have attempted to influence any governmental actor. There is no allegation that defendants petitioned a court, an administrative agency, an executive officer, or a legislature. Therefore, the district court's conclusion that the defendants' primary objective was to influence legislation is in error. Although the defendants' acts generated publicity which they may have hoped would influence governmental actors, this tangential contact is not sufficient to invoke First Amendment protection for otherwise criminal behavior. *See NAACP v. Claiborne Hardware, Inc.*, 458 U.S. 886, 916 (1981).

II. Standard of Review

We review a 12(b)(6) dismissal *de novo*. *Bethlehem Steel Corp. v. Bush*, 918 F.2d 1323, 1326 (7th Cir. 1990); *Sutliff, Inc. v. Donovan Companies, Inc.*, 727 F.2d 648, 654 (7th Cir. 1984). An action may only be dismissed if the complaining party "can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957) (footnote omitted). We assume all well-pleaded allegations are true and draw all reasonable inferences in the light most favorable to the plaintiff. *Summit Health, Ltd. v. Pinhas*, 111 S. Ct. 1842, 1845 (1991); *Bethlehem Steel*, 918 F.2d at 1326.

III. Antitrust Claims

The Supreme Court has cautioned that summary procedures should be used sparingly in antitrust cases because of the complexities involved. *Poller v. Columbia Broad-*

casting System, Inc., 368 U.S. 464, 473 (1962). Nevertheless, we have noted that "despite its sweeping language, *Poller* and its progeny simply stand for the proposition that, if a claim under the antitrust laws has been adequately set forth in the complaint, the highly factual and subjective questions of intent and purpose should be resolved after discovery and trial." *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101, 1106 (7th Cir. 1984) (citing *Havoco of America, Inc. v. Shell Oil Co.*, 626 F.2d 549, 559 (7th Cir. 1980), *cert. denied*, 470 U.S. 1054 (1985)). We also note that the treatment of this case has not been precipitous. It was filed on October 17, 1986. After discovery and two amendments to the complaint, the district court dismissed the action May 28, 1991.

Although Congress "left no area of its constitutional power [over commerce] unoccupied," when it passed the Sherman Act, it did not intend to outlaw every contract, combination, or conspiracy that restrains trade. *Summit*, 111 S. Ct. at 1846 n.10 (quoting *United States v. Frankfort Distilleries, Inc.*, 324 U.S. 293, 298 (1945)). Otherwise every commercial business contract would fall within its prohibition. *See Standard Oil Co. v. United States*, 221 U.S. 1, 59-69 (1911) (despite broad wording, not every form of combination or conspiracy that restrains trade falls within Sherman Act); *Marjorie Webster Jr. College v. Middle States Association of Colleges and Secondary Schools*, 432 F.2d 650, 653 (D.C. Cir.), *cert. denied*, 400 U.S. 965 (1970); *National Society of Professional Engineers v. United States*, 435 U.S. 679, 687-88 (1978). *But see Goldfarb v. Virginia State Bar*, 421 U.S. 773, 787 (1974) (language of § 1 "contains no exception. . . . [O]ur cases have repeatedly established that there is a heavy presumption against implicit exemptions.").

We generally are reluctant to delve into questions of legislative intent when applying statutes. *See West Virginia University Hospitals v. Casey*, 111 S. Ct. 1138, 1147-48 (1991). The Supreme Court, however, has expressly sanctioned inquiry into the legislative history of the antitrust laws. *See Brunswick Corp. v. Pueblo Bowl-O-Mat,*

Inc., 429 U.S. 477, 488 (1976) (examining legislative purpose and history of Clayton Act); *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 489 (1939) (interpreting Sherman Act in light of legislative history and "particular evils at which the legislation was aimed.").

The Court explained in *Apex Hosiery*, 310 U.S. at 493 n.15, that "[t]he history of the Sherman Act as contained in the legislative proceedings is emphatic in its support for the conclusion that 'business competition' was the problem considered and that the act was designed to prevent restraints of trade which had a significant effect on such competition." For this reason, we question the appropriateness of the Act's application in this case.

We believe the Eighth Circuit's analysis of the legislative history of the Sherman Act in *State of Missouri v. National Organization for Women*, 620 F.2d 1301 (8th Cir.), *cert. denied*, 449 U.S. 842 (1980) ("*Missouri v. NOW*"), is particularly helpful. In *Missouri v. NOW*, the National Organization for Women helped organize a convention boycott of all states that had failed to ratify the Equal Rights Amendment. The explicit purpose of the boycott was to put economic pressure on states to ratify the ERA. Missouri sued, arguing that the boycott constituted a restraint of trade in violation of the Sherman Act.[6]

The *Missiouri v. NOW* court noted that the legislative debates preceding passage of the Sherman Act indicate that the Act was not intended to reach the activities of

[6] We note that the boycott in *Missouri v. NOW* is readily distinguishable from the defendants' actions in this case. The boycott was a peaceful, otherwise lawful attempt to influence legislation. In this case defendants' conduct (trespass, extortion, vandalism, and theft) violates state criminal laws. "The First Amendment does not protect violence. 'Certainly violence has no sanctuary in the First Amendment, and the use of weapons, gunpowder, and gasoline may not constitutionally masquerade under the guise of advocacy.'" *NAACP v. Claiborne Hardware, Inc.*, 458 U.S. 886, 916 (1981) (quoting *Samuels v. Mackell*, 401 U.S. 66, 75 (1970) (Douglas, J., concurring)). Moreover, the avowed purpose of the defendants' activities is to close centers, not influence government actors.

organizations espousing social causes. Specifically, the debates indicated a desire to avoid regulating organizations aimed at discouraging the consumption of alcohol. *See id.* at 1307-08. Indeed, during the debates over the Sherman Act, senators expressed concern about the breadth of the bill, and Senator Sherman sought to allay these fears:

> George:[7] But yet that is the legal meaning and force of the bill; and I will state to the Senate and to the Senator from Ohio [Sherman] that it is directly within the terms of this bill to forbid any number of persons belonging to or joining a temperance society whose object is to compel retailers of intoxicating liquors to give up their business.
>
> Sherman: Where men agree that they will not drink at all, does the Senator think that is a combination in restraint of the trade of liquor-sellers?
>
> George: What is it?
>
> Sherman: The Senator, as I understand, now claims that an agreement among several people not to drink whisky or brandy is in restraint of the trade of selling whisky or brandy and is therefore a combination within the meaning of this bill?
>
> George: I insist that a society, making an agreement or a combination between citizens of a town anywhere in the Union not to drink, not to use in any way vinous or spirituous liquors, and to persuade others to a similar abstention, does, in the language of this bill, tend to compel persons

[7] Senator James Z. George (D. Miss.). *See* 1 Earl W. Kintner, The Legislative History of the Federal Antitrust Laws and Related Statutes 15 (1978).

engaged in retailing liquor in that community to give up their business, and the doing of that is expressly condemned by the third section of this bill.

Stewart:[8] If an organization for the purpose of having laws passed creating high license is formed, would not that enhance the value of the things prohibited in this bill?

George: I have considered that question. I have thought possibly that the courts might say that the right of a political organization to bring about political results by legislation was not embraced within the provisions of the bill.

1 Kintner, at 77-79 (quoting 20 Cong. Rec. 1458-59 (February 4, 1889)).

The 50th Congress did not pass an antitrust law; nevertheless, as Kintner has noted "these proceedings shed light on Congress' motivation and its assessment of the economic, political, and legal forces which were operating in the country." 1 Kintner, at 15. The 51st Congress passed the antitrust bill in a relatively short time, and debated it for only seven days. *Id.* at 17. During these debates the Senate again discussed the interaction between the Sherman Act and the temperance movement:

Wilson:[9] I desire to offer an amendment to come in at the end of section 1 of the bill, and as an addition to the proviso contained in that section.

The Presiding Officer. The Secretary will state the amendment proposed by the Senator from Iowa.

The Chief Clerk. It is proposed to add at the end of the second proviso to section 1:

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[8] William M. Stewart (R. Nevada). *Id.* at 79.

[9] James F. Wilson (R. Iowa). *Id.* at 20.

Nor to any arrangements, agreements, associations, or combinations among persons for the enforcement and execution of the laws of any State enacted in pursuance of its police powers; nor shall this act be held to control or abridge such powers of States.

* * *

Hoar:[10] Allow me to ask the Senator if his amendment accomplishes his object. I understand his object is to protect combinations of persons intended to discourage the use and manufacture of intoxicating liquors.

Wilson: My object is to exclude them from the operation of the bill.

Hoar: I understand, to protect them from being affected by it. But the only description in his amendment is of such associations as are in aid of the execution of the laws of a State in pursuance of its police power. Now, if this bill without his amendment would render the class of persons subject to the penal provision, all temperance societies whose object is to persuade mankind not to use intoxicating liquors would still remain in spite of his amendment within the purview of bill. *It seems to me he should extend his amendment a little further, because, as far as my State goes, this class of associations which he has described do not confine their efforts to the execution of the law, but their efforts are a great deal more extensive and extend to discouraging the use or manufacture of intoxicating liquors altogether.* This is what he means, and we should all vote for it.

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[10] George F. Hoar (R. Massachusetts). *Id.* at 14.

Wilson: I am satisfied that my amendment will cover the purpose I have in view concerning my State. If other Senators desire something further in regard to their state, they can move it.

Hoar: I move to amend the Senator's amendment by adding to it:

Or to discourage the use or manufacture of intoxicating liquors.

And we will take a vote on that.

The Presiding Officer. The question is on agreeing to the amendment to the amendment.

Sherman: The Senator from Iowa showed me his amendment. As these organizations in Iowa are associated and organized something in the nature of a corporation, there might be some reason for believing that they possibly might fall within the clauses of the bill. Therefore, I have no objection to his amendment, but I do not see any reason for putting in temperance societies any more than churches or school-houses or any other kind of moral or educational associations that may be organized. Such an association is not in any sense a combination arrangement made to interfere with interstate commerce; but under the peculiar circumstances, upon the facts stated by the Senator from Iowa, I think it is very proper to make an exception of those organizations in Iowa which are really in aid of the execution of State law. I would apply it to all organizations which are using either moral or any other kind of means for the enforcement of local laws; but I do not think it is worth while to adopt the amendment of the Senator from Massachusetts, because that would

> include temperance societies. You might as well include churches and Sunday schools.

Id. at 250-52 (quoting 21 Cong. Rec. 2658-59 (1890)) (emphasis added).

Protests against establishments *legally* serving liquor were sometimes violent. *See* Jack S. Blocker, Jr., Give to the Winds Thy Fears: The Women's Temperance Crusade, 1873-1874, 50, 76-77, 197 (1985) (describing violence by protesters and against them). *See also* Joseph Gusfield, Symbolic Crusade: Status Politics & the American Temperance Movement (2d ed. 1986); Mother Stewart, Memories of the Crusade, A Thrilling Account of the Great Uprising of the Women of Ohio in 1873, Against the Liquor Crime (1972). Temperance "crusaders" as they were sometimes called, "physically attacked saloons, sometimes with hatchets, hammers, and other tools, destroying the stock of liquor and perhaps the furnishings as well." Blocker, at 50.

Other crusaders contented themselves with "peaceful" invasions, wherein they would descend *en masse* to pray and plead with druggists and saloon keepers to stop selling liquor. They also "stationed one or two women at each dealer's door, to plead with or simply embarrass those seeking to enter." *Id.* at 48. Often large numbers of crusaders would march on recalcitrant liquor sellers. A violent scuffle ensued when 100 crusaders descended upon a tavern in Columbus, Ohio. *Id.* at 197. Thirty entered the tavern and refused to leave, and the owner called the police. Before police arrived, one of the women crusaders fought with the proprietor and his wife. Although they left the premises when asked by the police, crusaders continued to picket the establishment. *Id.* To provide potential drinkers with a social alternative to the saloon, crusaders set up reading rooms and coffee houses. They offered such establishments in at least twenty locations in six states. *Id.* at 50. The violence surrounding the temperance movement was well-publicized, and legislators

were undoubtedly aware of the crusaders' activities. *See, e.g.*, Mother Stewart, Memories of the Crusade, 98-101 (1972) (discussing press coverage of crusaders' activities).

Commentators have pointed out the parallels between the modern-day anti-abortion protests and the temperance movement. "One is drawn to recall slavery and prohibition as the historical analogues to this controversy." Elizabeth Mensch & Alan Freeman, *The Politics of Virtue: Animals, Theology and Abortion*, 25 Ga. L. Rev. 923, 926 (1991). Indeed, the parallels are striking. Defendants here have entered clinics violently, assaulted personnel, and destroyed medical supplies. They lead large groups of protesters to health centers to persuade center staff to stop performing abortions. They confront patients and plead with them not to enter the centers. Wojnar and Terry have established "pro-life" pregnancy counseling centers, which like the temperance crusaders' coffee houses, purport to provide an alternative for the centers' services.

While the language of the congressional debates is not unequivocal, like the court in *Missouri v. NOW*, we believe it provides a fair indication that Congress did not intend to reach every activity that might effect business. As the Senator from Massachusetts remarked, even temperance organizations that went beyond the execution of state laws in discouraging people from consuming liquor were not to be covered by the Act. Sherman's comments mitigate this conclusion somewhat, because he discusses only those organizations attempting to bolster the execution of state laws.

Some of these comments foreshadow the development of the *Noerr-Pennington* doctrine, which protects businesses' and other associations' efforts to obtain a governmental imposition of a trade restraint. *United Mine Workers of America v. Pennington*, 381 U.S. 657 (1965); *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *Lawline v. American Bar Association*, 956 F.2d 1378 (7th Cir. 1992). But, as we pointed out in our discussion of the background facts, the plain-

tiffs do not complain about petitioning. "The doctrine does not . . . protect purely private action not genuinely aimed at prompting governmental action." *Wilk v. American Medical Association*, 895 F.2d 352, 357 (7th Cir. 1990). *Cf. Vietnamese Fishermen's Association v. Knights of the Ku Klux Klan*, 518 F. Supp. 993 (1981) (*Noerr* does not protect attempt to eliminate a class of competitors—other fishermen—using violence, threats, vandalism).

Other cases successfully invoking the doctrine's protection have alleged in the complaint the petitioning activity. *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1971) (state and federal administrative proceedings to bar plaintiffs' entry into trucking market); *Pennington*, 381 U.S. at 657 (influencing Secretary of Labor to enact labor standards); *Noerr*, 365 U.S. at 127 (false publicity campaign to convince legislators and governor to enact legislation harmful to competitors); *Lawline v. American Bar Association*, 956 F.2d 1378 (7th Cir. 1992) (lobbying state to adopt ethical rules). Because the defendants' acts are far removed from the direct petitioning protected in these cases, we do not believe they are protected by the *Noerr-Pennington* doctrine. In fact, the defendants' audacity in asserting that violence, criminal trespass, and vandalism are proteced by the First Amendment, rivals Carry Nation's—after inciting a riot by smashing up a saloon with an axe, she declared, "There is a spirit of anarchy abroad in this town!" Robert Lewis Taylor, Vessel of Wrath: The Life and Times of Carry Nation, 201 (1966).[11]

We are convinced by the economic and legislative history of the Sherman Act that it was intended to prevent business competitors from making restraining arrange-

[11] We also note Professor Fischel's point that "conduct unprotected by *Noerr* does not necessarily constitute an antitrust violation." Daniel R. Fischel, *Antitrust Liability for Attempts to Influence Government Action: The Basis & Limits of the Noerr-Pennington Doctrine*, 45 U. Chi. L. Rev. 80, 82 (1977).

ments for their own economic advantage. As the Court stated in *Allen Bradley Co. v. Union*, 325 U.S. 797, 811 (1945), "We know that Congress feared the concentrated power of business organizations to dominate markets and prices. It intended to outlaw business monopolies."[12] Defendants are not involved in business, and have no ability to concentrate economic power. This, together with the striking parallels between their activities and those of the temperance crusaders, which Congress, it would seem, intended to exclude from the operation of the Act, forces us to conclude that the defendants' activities are not prohibited by the Sherman Act.

We are not the first court to conclude that certain agreements are not within the scope of the antitrust laws. In *Missouri v. NOW*, 620 F.2d at 1301, the Eighth Circuit concluded that Congress probably did not intend to include political boycotts by non-competitors. The court in *Marjorie Webster Jr. College v. Middle States Association of Colleges and Secondary Schools*, 432 F.2d 650, 653 (D.C. Cir.), *cert. denied*, 400 U.S. 965 (1970), concluded that when restrictions on college accreditation have no commercial motive, "the process of accreditation is an activity distinct from the sphere of commerce; it goes rather to the heart of the concept of education itself. We do not believe that Congress intended this concept to be molded by the policies underlying the Sherman Act." *Id.* at 655 (footnotes omitted). *See also Council for Employment & Economic Energy Use*, 580 F.2d 9, 12 (1st Cir. 1978) (Complaint alleging radio stations that agreed on amount of free air time for plaintiff's political opponent violated antitrust laws dismissed on 12(b)(6): "This case involves political opponents not commercial competitors; and political objectives not market place goals."), *cert. denied*, 440 U.S. 945 (1979).

We observe, as we did in *Havoco of America, Ltd. v. Shell Oil Co.*, 626 F.2d 549, 559 (7th Cir. 1980), that "it

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[12] *Allen Bradley* involved an illegal combination of a labor union, contractors, and manufacturers.

is hard to ignore the suspicion that the facts have been forced into an antitrust mold to achieve federal jurisdiction." We believe it is unfortunate that the plaintiffs lack an effective remedy for the defendants' reprehensible conduct, but we find no antitrust violation here. *But see Volunteer Medical Clinic, Inc. v. Operation Rescue*, 948 F.2d 218 (6th Cir. 1991) (discussing besieged abortion clinic's claim under 42 U.S.C. § 1985(3)). Non-commercial purpose alone will not shield activity from antitrust scrutiny, *see Costello Publishing Co. v. Rotelle*, 670 F.2d 1035 (D.C. Cir. 1981) (dispute between lay and clerical members of Roman Catholic Church), but the defendants' acts are far beyond those that Congress intended to reach with the Sherman Act.

At bottom, the basic question presented by the plaintiffs' complaint is whether the antitrust laws protect an industry faced with violent opposition from some segment of the public. For example, could nuclear power providers or logging companies bring antitrust claims against the Earth First! organization for vandalism and trespass? *See, e.g.*, Glenn Bohn Vansun, *Walbran Activists Deny Link to Radical Environmental Group*, Vancouver Sun, Sept. 21, 1991, at A1 (describing sabotage of nuclear plant's electrical lines, tree spiking, and logging equipment damage). We do not believe these kinds of actions are within the scope of the antitrust laws. The defendants' actions are directed against *all* centers providing abortions.

The Court's analysis in *Apex Hosiery*, another case involving violent, "reprehensible" conduct by defendants which fell outside the scope of the Sherman Act, bolsters our conclusion that the plaintiffs' complaint was properly dismissed. 310 U.S. at 484. In *Apex Hosiery*, union members from nearby factories took over the plaintiff's plant and remained in possession for more than a month. *Id.* at 482. The invaders changed the locks, wilfully wrecked machinery, and damaged property and equipment. Operations at the plant could not resume for two months after the plaintiff regained possession. *Id.* The union acted to force the plaintiff to hire only union employees. *Id.* at 482.

The Court explained that although the union members violated the civil and penal laws of Pennsylvania, if no antitrust violation occurred, the violence and state-law violations did not confer federal jurisdiction. *Id.* at 483-84. The Court rejected the union's contention that all labor activities are exempt from Sherman Act, *id.* at 487, just as we reject defendants' contention that all "protest" or non-commercially oriented activities are exempt because of the First Amendment.

The Court analyzed the defendants' conduct, and determined that

> the Sherman Act was directed only at those restraints whose evil consequences are derived from the suppression of competition in the interstate market, so as 'to monopolize the supply, control its price or discriminate between its would-be purchasers.' And in speaking of intent as a prerequisite to liability under the Act where the restraint to interstate commerce is 'indirect' [we] mean no more than that the conspiracy or combination must be aimed or directed at the kind of restraint which the Act prohibits or that such restraint is the natural and probable consequences [sic] of the conspiracy.

Apex Hosiery, 310 U.S. at 511 (quoting *United Mine Workers v. Coronado Coal Co.*, 259 U.S. 344, 471 (1921)). The Court emphasized that the cases interpreting the Sherman Act recognized that "[t]he Sherman Act was not enacted . . . to afford a remedy for wrongs, which are actionable under state law, and result from combinations and conspiracies which fall short, both in their purpose and effect, of any form of market control of a commodity, such as to monopolize the supply, control its price, or discriminate between its would-be purchasers." *Id.* at 512. Finally, the Court emphasized that "[r]estraints not within the Act, when achieved by peaceful means, are not brought within its sweep merely because, without other differences, they are attended by violence." *Id.* at 513.

We find this reasoning applicable here. The plaintiffs have not alleged that the defendants are exercising market power to harm their businesses. Rather, the plaintiffs seek federal protection from the defendants' campaign of otherwise-criminal activities which are directed at destroying all health centers performing abortions. Plaintiffs have failed to make the required showing that the defendants have exerted market control of the supply of abortion services, control of price (beyond raising prices by increasing costs[13]), or discrimination between would-be purchasers.

The myriad cases upon which plaintiffs rely offer little help. We have found only one case where non-competitor defendants tried to destroy a plaintiff's business. *Council of Defense v. International Magazine Co.*, 267 F. 390 (8th Cir. 1920). In that case, the Counsel of Defense, a group of New Mexico residents, organized a boycott of the Hearst newspapers and magazines to protest what they perceived as Hearst's pro-German sympathies.

The court found the conspiracy to boycott and blacklist the publications was prohibited by the Sherman Act. We believe, however, that this case is no longer good law. In *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1981), the Court held that a sometimes-violent boycott organized by black people against white merchants was beyond the reach of economic regulation. *Id.* at 913. The boycott was designed to force civic and business leaders to comply with a list of demands for racial equality and integration. The Court, relying in part upon *Eastern Railroad Presidents Conference v. Noerr Motor Freight*, 365 U.S. at 127 (1961), held that the non-violent aspects of political boycotts are protected by the First Amendment.

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[13] This is not to say that cartels or would-be monopolists who try to injure competitors by raising costs are not subject to the antitrust laws. *See, e.g., Premier Electric Construction Co. v. National Electrical Contractors Ass'n*, 814 F.2d 358, 368 (7th Cir. 1987) (discussing anticompetitive effects, and thus illegality, of raising rivals' costs). *See also* 3 Milton Handler, Antitrust in Transition 1178-79 (1991).

Id. at 915. *Claiborne* calls into question the holding in *Council of Defense*. We conclude that *Council of Defense* is not controlling here.

Because we find that Congress did not intend to include defendants' activities within the scope of the Sherman Act, we affirm the district court's dismissal of the plaintiffs' antitrust claims.

IV. RICO

The Plaintiffs have also claimed that defendants Scheidler, Terry, Scholberg, Murphy, PLAL, Operation Rescue, and Project Life have violated the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1962(a),(c),(d).

A. § 1962(a)

The plaintiffs alleged in count two of the complaint that PLAN, PLAL, and Operation Rescue violated § 1962(a)[14] because the donations they receive from supporters are derived from their racketeering activity. The racketeering activity is extortion under the Hobbs Act, 18 U.S.C. § 1951, directed at health centers, center employees, and patients. Plaintiffs asserted that "[i]t is well-known that the more outrageous and highly publicized the activities are, the more likely the RICO Defendants and the enterprises are to receive larger donations." RICO Case Statement, R. 469, at 22.

The district court dismissed the plaintiffs' claims under § 1962(a) because it found that the income defendants re-

[14] 18 U.S.C. § 1962(a) provides in relevant part:

> It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal . . . to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect interstate commerce.

ceive through donations was not "derived directly or indirectly, from a pattern of racketeering activity." 765 F. Supp. at 941. Because contributors were not extorted, the court held that the contributions were not derived from racketeering activities.

In reaching its holding, the district court relied heavily upon *Hemmings v. Barian*, 822 F.2d 688 (7th Cir. 1987). In *Hemmings*, the defendant agreed to purchase the plaintiff's company for a cash downpayment, plus five subsequent cash payments and other consideration. *Id.* at 692. The plaintiff alleged that the defendant never intended to make the subsequent payments, and instead used the money to buy a second corporation. The plaintiff argued that the defendant violated § 1962(a) because the money saved by failing to make payments was "derived from a pattern of racketeering activity." *Id.*

We refused to accept this argument—we found that although the defendant may have used income he owed plaintiff to fund his second business, there was no suggestion that *that* income came from fraud. *Id.* The source of the misapplied income was "proper and aboveboard. The fraud was in promising to pay Hemmings the balance of the agreed purchase price . . ., when Barian had no intention of ever paying it." *Id.* Because the money was lawful income, not extracted from the plaintiff (or anyone else) by fraud, we refused to find a RICO violation.

Plaintiffs argue that *Hemmings* does not support the district court's holding because "in *Hemmings*, the defendant did not 'derive' the money from anything illegal—he already had it. Here, the defendants had the money only after their well-publicized, unlawful acts prompted their supporters to send them the money . . . ." Appellants' Brief at 48. This argument is unpersuasive. The plaintiffs argue based upon their reading of *Azurite Corp. v. Amster & Co.*, 730 F. Supp. 571, 578 (S.D.N.Y. 1990), that the *Hemmings* claim was dismissed because the plaintiff failed to plead a causal connection between the fraud and the income invested. Based on this reading,

plaintiffs argue that *Hemmings* does not dictate the dismissal of their claim under § 1962(a) because they pleaded a connection.[15]

Plaintiffs attempt to bolster this argument with references to *United States v. Vogt*, 910 F.2d 1184, 1194 (4th Cir.), *cert. denied*, 111 S. Ct. 759 (1991), and *United States v. McNary*, 620 F.2d 621, 628 (7th Cir. 1980). These cases are unavailing. In *Vogt*, the defendant, a customs officer, laundered bribe money through a group of dummy corporations that deposited money off-shore, brought it back into the United States, and then invested it. Vogt argued that the government failed to prove he invested the bribe money in the laundering enterprises. The court stated that "[s]ection 1962(a) does not exact rigorous proof of the exact course of income derived from a pattern of racketeering activity into its 'ultimate use or investment.' " *Id.* at 1194.

Plaintiffs point to this language in support of their contention that they adequately have alleged that the donations defendants receive are "derived" from their racketeering acts. This argument is specious—the Fourth Circuit was dismissing the argument that the government in its proof, must trace illegally received money "from its receipt to its ultimately proscribed 'use or investment' by the defendant." *Id.* In other words, plaintiffs in this case are not required to show the specific flow of contributions from the time the defendants receive them until they ultimately spend them. There was no question that Vogt derived income from racketeering—he took bribes.

McNary is analogous. McNary, as Mayor of Lansing, Illinois, was convicted of bribery and extortion. The issue on appeal was whether the government proved that McNary invested the $85,000 in bribery receipts in his family-owned travel company. We noted that the statute

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[15] *Azurite* held that defendants who were able to purchase stock at artificially low prices because of their fraudulent SEC filings derived income from the fraud within the meaning of § 1962(a).

does not require "immediate or even direct use of illicit income to establish a violation of its terms. . . . To require . . . that the evidence show a direct employment of illicit income is to ignore the clear proscription of the statute . . . ." *McNary*, 620 F.2d at 628. Plaintiffs again misapprehend this language. *See* Appellants' Brief at 49. In *McNary* we held that interim deposits, commingled funds, and other accounting techniques do not bar liability. Section 1962(a) does not require the government to trace the course of each penny of illicit income through the defendant's hands. *McNary*, 620 F.2d at 629.

Thus the cases the plaintiffs cite are inapposite to their claim—at issue here is whether the defendants' contributions were derived from their extortionate acts. We agree with the district court that they were not. Plaintiffs concede that the contributions are only "indirect" income from the extortionate acts, but they argue this is sufficient under § 1962(a). That section does sanction the use of funds "derived, directly or indirectly, from a pattern of racketeering activity." The attenuated causal connection between the defendants' criminal trespass, threats, and vandalism, and their receipt of donations from third parties, however, is not sufficient.

The Supreme Court has noted that notions of proximate cause are properly applied to RICO. *Holmes v. Securities Investor Protection Corp.*, 112 S. Ct. 1311 (1992). In *Holmes*, the Court held that an insurance company could not recover under § 1962 based upon the defendants' fraud on its insured and its insured's customers. *Id.* Proximate cause generally is associated with the determination in civil tort litigation as to whether the plaintiff's injury was direct enough to permit him to recover from the defendant. *Id.* at 1318. Nevertheless, we believe this judicial tool for examining the directness of a relationship is helpful in this context. "At bottom, the notion of proximate cause reflects 'ideas of what justice demands, or of what is administratively possible and convenient.' " *Id.* (quoting W. Keeton, D. Dobbs, R. Keeton, & D. Own, Prosser and Keeton on Law of Torts §41, p. 264 (5th ed. 1984)). The

cause and effect chain plaintiffs posit is something like this: defendants invade health centers, destroying property and injuring center staff; media covers event; potential contributors see media coverage and are favorably impressed; contributor sends donation; defendants receive income. Based in part upon notions of proximate cause, we believe this alleged relationship between the defendants' criminal acts and their supporters voluntary contributions is simply too tenuous to satisfy the requirements of § 1962(a).

We also find the cases interpreting the RICO forfeiture provisions of § 1963 support our conclusion. Section 1963(a)(1) requires that a defendant forfeit "any interest he has acquired or maintained in violation of § 1962 . . . ." In interpreting the term "interest" under this section, we have held that "the court must determine what portion of [the defendant's] interests would not have been acquired or maintained 'but for' his racketeering activities. *United States v. Horak*, 833 F.2d 1235, 1243 (7th Cir. 1987). *See also United States v. Ofchinick*, 883 F.2d 1172, 1183 (3d Cir. 1989) (applying *Horak*'s 'but for' test), *cert. denied sub nom., DeLucia v. United States*, 493 U.S. 1034 (1990); *United States v. Porcelli*, 865 F.2d 1352, 1365 (2d Cir. 1989) (same), *cert. denied*, 493 U.S. 810 (1989).

Following this reasoning, under § 1962(a), "income derived, directly or indirectly, from a pattern of racketeering activity" is only income that the defendants would not have received 'but for' their racketeering conduct. Here, plaintiffs have not alleged that contributors would not have donated money to the defendants but for the defendant's predicate racketeering acts. Therefore, the income is not derived from racketeering activity for purposes of § 1962(a).

B. § 1962(c)

In count three, plaintiffs allege that Pro-Life Action Network ("PLAN") operated as an enterprise in violation of § 1962(c). PLAN is a coalition of anti-abortion groups. The

defendants who have participated in PLAN activities, the "PLAN defendants," are Scheidler, Ryan, Terry, Scholberg, Murphy, Wojnar, Migliorino, Pro-Life Action League ("PLAL"), Pro-Life Direct Action League ("PDAL"), Operation Rescue ("OR"), and Project Life.

Section 1962(c) prohibits conduct of an enterprise through a pattern of racketeering activity.[16] *See Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479 (1985). The district court dismissed the plaintiffs' § 1962(c) claims because it found that § 1962(c) requires that plaintiffs allege "some profit-generating purpose." *Scheidler*, 765 F. Supp. 937, at 943. The court read existing case law to require either the predicate acts of racketeering or the enterprise to have some financial motive. *Id.* at 942 (citing *United States v. Flynn*, 852 F.2d 1045, 1052 (8th Cir. 1988), *cert. denied*, 488 U.S. 974 (1988)); *United States v. Ferguson*, 758 F.2d 843, 853 (2d Cir. 1985); *United States v. Bagaric*, 706 F.2d 42, 55 (2d Cir. 1983), *cert. denied*, 474 U.S. 1032 (1985); *United States v. Ivic*, 700 F.2d at 65; *United States v. Anderson*, 626 F.2d 1358, 1372 (8th Cir. 1980), *cert. denied*, 450 U.S. 912 (1981). The plaintiffs argue that only an economic effect on interstate commerce is required, which they have alleged.

Whether or not liability under RICO may be imposed when neither the enterprise nor the racketeering acts are economically motivated is a question of first impression in this circuit. The other circuits are split on the issue. *Compare United States v. Flynn*, 852 F.2d 1045, 1052 (8th Cir. 1988) ("For purposes of RICO, an enterprise must be directed toward an economic goal."); *United States v. Ivic*, 700 F.2d 51, 59-65 (2d Cir. 1983) (same) *with North-*

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[16] § 1962(c) provides:

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

east Women's Center, Inc. v. McMonagle, 868 F.2d 1342, 1349-40 (3d Cir. 1989) (because predicate offense (Hobbs Act) does not require economic motive, RICO requires no additional economic motive), *cert. denied*, 493 U.S. 901 (1989); *Feminist Women's Health Center v. Roberts*, No. C86-1617, 1988 WL 156656, *11 n.2 (W.D. Wash., Mar. 11, 1988) (citing *McMonagle* and declining to follow *Ivic*). In his dissent from the denial of certiorari in *McMonagle*, Justice White noted the conflict.

Although we have never grappled with the economic motive issue head on, we have adopted the Eighth Circuit's definition of enterprise, which includes an economic goal requirement. *United States v. Neapolitan*, 791 F.2d 489, 500 (7th Cir. 1986) (quoting *United States v. Anderson*, 626 F.2d 1358, 1372 (8th Cir. 1980), *cert. denied*, 450 U.S. 912 (1981)), *cert. denied*, 479 U.S. 939 (1986). Other circuits have also adopted the *Anderson* formulation. *See United States v. Perholtz*, 842 F.2d 343, 363 (D.C. Cir. 1988); *United States v. Errico*, 635 F.2d 152, 156 (2d Cir. 1980).

Section 1961(1)(4) states that an enterprise "includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact though not a legal entity." In this case, PLAN does not appear to have legal status as a corporation, partnership, or association recognized by state law. Rather, it is a group that organizes anti-abortion activities. Hence, it comes under the "group of individuals associated in fact though not a legal entity" portion of § 1961.

Anderson and *Neapolitan* provide the framework for determining whether an informal association is an enterprise. In *Anderson*, two court administrators were charged with defrauding their employers through a false purchase-order scheme. 626 F.2d at 1980. The indictment alleged that each defendant's association with the salesman who supplied the phony invoices constituted the enterprise. Now, of course, the government more routinely alleges that the

entities that employ such defendants are the enterprise, i.e. the sheriff's office, (*United States v. Lee Stoller Enterprises*, 652 F.2d 1313 (7th Cir. 1981), *cert. denied*, 454 U.S. 1082 (1981)), the state's attorney's office, (*United States v. Yonan*, 800 F.2d 164, (7th Cir.), *cert. denied*, 479 U.S. 1055 (1986)), etc. The *Anderson* court found that the enterprise must "signify an association that is substantially different from the acts which form the pattern of racketeering activity." *Anderson*, 626 F.2d at 1365. After a thorough analysis of the statutory language, the court held that the term enterprise

> encompass[es] only an association having an ascertainable structure which exists for the purpose of maintaining operations *directed toward an economic goal* that has an existence that can be defined apart from the commission of the predicate acts constituting the pattern of racketeering activity.

Id. at 1372 (emphasis added).

We adopted this holding in *Neapolitan*, where we too distinguished between the racketeering acts and the enterprise. 791 F.2d at 500. *Neapolitan* considered the enterprise in two RICO cases involving a stolen car ring. In one, police officers took bribes from car thieves, and were charged with conducting the sheriff's office (the enterprise) through a pattern of racketeering activity. In the other, the car thieves themselves operated a large scale "chop shop," which was allegedly the RICO enterprise.

As plaintiffs point out, economic motive was not an issue in either *Neapolitan* or *Anderson*. It was clear defendants were acting for financial gain. Another case adopting *Anderson*, *United States v. Errico*, 635 F.2d 152, 156 (2d Cir. 1980), did place some emphasis on the profit motive. *Errico* involved a conspiracy to fix horse races. The court found that a circle of betters and jockeys, joined together through the defendant, satisfied the enterprise requirement because they regularly attempted to and did profit from the illegally fixed races. *Id.* at 156.

The lack of significant focus on motive weakens the authority of these cases somewhat on this particular issue, however, so we turn to the cases that have confronted it directly. The leading case, *United States v. Ivic*, 700 F.2d 51 (2d Cir. 1983), involved a Croatian nationalist group that used "terror, assassination, bombings, and violence in order to foster and promote their beliefs and in order to eradicate and injure persons whom they perceived as in opposition to their beliefs." *Id.* at 58.

In a carefully reasoned opinion, the court in *Ivic* drew upon the language of the statute, its legislative history, Supreme Court precedent, and Justice Department Guidelines to determine that the enterprise or predicate acts must have an economic motive to violate RICO.

Reading 1962(c) together with sections (a) and (b), the *Ivic* court stated that the term enterprise in those sections referred to "an organized profit-seeking venture." *Id.* at 60. It noted there was no indication that Congress intended to have the same term mean something different in section (c). Indeed, the Supreme Court has stated that "We should not lightly infer that Congress intended [terms] to have wholly different meanings in neighboring subsections." *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 489 (1984). The court examined the legislative history of the Act, and explained that the terrorist actions were not part of the "evil corruption of our commerce and trade" which the Act was intended to remedy. *Ivic*, 700 F.2d at 63 (quoting 116 Cong. Rec. 35295, remarks of Representative Poff).

The *Ivic* court observed that although *United States v. Turkette*, 452 U.S. 576 (1981), held that the term enterprise encompasses illegitimate organizations, it did not suggest the term reaches every such organization. *Turkette* recognized that RICO was originally directed at the infiltration of organized crime into legitimate business with funds raised through loan sharking, illegal gambling, and other criminal activities. *Id.* (citing *Turkette*, 452 U.S. at 591 (1981)). The *Ivic* court found that political terrorist

organizations do not generate funds that could allow them to infiltrate legitimate business. *Id.* This court has noted that although infiltration by organized crime was the major concern of Congress, those concerns extended much further. *Horoco v. American National Bank & Trust Co. of Chicago*, 747 F.2d 384 (7th Cir. 1984) (citing *Turkette*, 452 U.S. at 590-91), *aff'd*, 473 U.S. 606 (1985). In fact the Supreme Court has noted that "although [RICO] had organized crime as its focus, [it] was not limited in application to organized crime." *H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 248 (1989). Nevertheless, we believe congressional concerns may not have extended so far as the activities of political terrorists which involve neither economic crimes nor economic motivations.

The *Ivic* court also stated that the Justice Department's 1981 RICO Guidelines provided that a RICO indictment should not charge an association as an enterprise, unless the association exists "for the purpose of maintaining operations directed toward an economic goal . . . ." *Id.* at 64. Based on these factors, the *Ivic* court held that an indictment that fails to charge that the enterprise or predicate acts had an economic motive does not state a crime under § 1962(c).

The Second Circuit returned to the issue in *United States v. Bagaric*, 706 F.2d 42 (2d Cir.), *cert. denied*, 464 U.S. 840 (1983). *Bagaric* also involved a Croatian terrorist group, but the defendants also "perpetrated an extensive international extortion scheme using the United States and foreign mails." *Id.* at 46. The group, in addition to bombing, arson and murder, established a scheme to extort money from moderate Croatians in the United States to support their activities. *Id.* at 48. The group compiled a list of "potential wealthy victims, and threatened to squeeze [them] financially . . ." *Id.* Extortion letters demanding $5,000 to $20,000 were posted from foreign countries directed victims to mail money to a post office box in Paraguay. Several individuals who resisted the extortion demands were killed. 706 F.2d at 50.

The court held that because some of the predicate acts were economically motivated, i.e. extorting money to finance terrorist activities, RICO's economic motivation requirement was satisfied. It pointed out that *Ivic* did not require that economic gain be the sole motive of every RICO violation. *Id.* at 53. *Ivic* only required that either the predicate acts or the enterprise be geared toward economic gain. Political motivations would not shield the "more than fifty acts of the classic economic crime of extortion . . . ." simply because the money would be used for political ends. *Id.* at 58. Thus *Bagaric* reaffirmed *Ivic*'s holding that the government (or a civil plaintiff) may show financial purpose through either the enterprise or the predicate racketeering acts. *Id.* at 56.

The Second Circuit revisited the issue again in *United States v. Ferguson*, 758 F.2d 843 (2d Cir.), *cert. denied*, 474 U.S. 1032 (1985). *Ferguson* involved bank and armored-truck robberies, and murders performed to support the Black Liberation Army. The defendants challenged their indictment under RICO because they were "revolutionaries." *Id.* at 853. The court explained, however, that RICO requires only "some financial purpose." *Id.* The defendants were charged with ten robberies and attempted robberies, and the murders of police and guards committed during the course of the robberies. The money obtained from the crimes was used to support the "revolutionary" enterprise. Because the defendants' activities were centered around the commission of economic crimes, the court held that RICO was properly applied to the defendants. *Id.*

Shortly after *Ferguson* was decided, the Supreme Court rejected the Second Circuit's interpretation of § 1962(c), which barred civil actions unless the defendant had been convicted of criminal charges and the plaintiff could show "racketeering injury." *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479 (1985). Plaintiffs in this case argue that *Sedima* prohibits any limitation on the scope of RICO. Appellants' Brief at 37. We disagree. This court, in *Haroco, Inc. v. American National Bank & Trust Co. of Chicago*, 747 F.2d 384 (7th Cir. 1984), *aff'd*, 473 U.S. 606 (1985), re-

jected the racketeering injury requirement, and held that injuries caused by the predicate acts of racketeering satisfy RICO. *Id.* at 388. We noted with some concern the Second Circuit's attempts to limit RICO to organized crime activities, and rejected that limitation.

Although we have resisted attempts to limit the scope of civil RICO, *see, e.g., Morgan v. Bank of Waukegan*, 804 F.2d 970, 975-76 (7th Cir. 1986) (multiple schemes not required for pattern of racketeering activity); *Schacht v. Brown*, 711 F.2d 1343 (7th Cir.) (rejecting argument that RICO limited to organized crime), *cert. denied*, 464 U.S. 1002 (1983), we do not believe the limitation imposed by the *Ivic, Bagaric, Ferguson*, line of cases is unwarranted. We recognize that "[e]ven if Congress did not anticipate all of the consequences of RICO, the breadth of the statute, including the civil provisions, was the result of deliberate policy choices on the part of Congress." *Haroco*, 747 F.2d at 398-99. But, as the Second Circuit discussed in *Ivic*, we believe the use of the term enterprise in §§ 1962(a) and (b) conveys a restriction to economic entities. *Ivic*, 700 F.2d at 61.

This court has also looked to the provisions of § 1962(a) to guide our interpretation of § 1962(c), albeit on a different point. *See Haroco*, 747 F.2d at 402 (interpreting interaction of roles of "enterprise" and "person"). The courts have extended the economic motivation limitation by allowing economically motivated predicate acts to bring conduct within the scope of RICO. Further expansion does not seem justified. "[W]e do not think the general principle of liberal interpretation of RICO can be used to stretch section 1962(c) to reach this situation in the face of the subsection's own limits." *Haroco*, 747 F.2d at 400.

Further, the Court in *Sedima* seemed particularly troubled by the vague, amorphous nature of the racketeering injury requirement. *Sedima*, 473 U.S. at 494-95. The economic motive requirement does not have this weakness. Moreover, the Court held that the statute requires only that the plaintiff allege each element of the viola-

tion, and that courts should not graft on additional elements. *Id.* at 497. In this case we do not believe we are adding elements to the offense, but merely fleshing out the definitions of those elements.

Further, despite its urging to avoid undue limitations of civil RICO, the Court has referred consistently to "businesses":

> Congress wanted to reach both 'legitimate' and 'illegitimate' enterprises. Legitimate businesses enjoy neither an inherent incapacity for criminal activity nor immunity from its consequences; and, as a result, § 1962(c)'s use against respected businesses allegedly engaged in a pattern of specifically identified criminal conduct is hardly a sufficient reason for assuming that the provision is being misconstrued.

Northwestern Bell, 492 U.S. at 229. This emphasis on business—economic activity—bolsters our conclusion that non-economic crimes committed in furtherance of non-economic motives are not within the ambit of RICO. We also find support in the economic motive requirement discussed in *Anderson*, *Neapolitan*, and *Flynn*, *supra*.

We do not believe that requiring an economic motive will place undue limitations upon RICO actions. Nor do we believe our holding flies in the face of the Supreme Court's dictates in *Sedima* and *Northwestern Bell*. Indeed, we find that this interpretation of § 1962(c) is dictated by the terms of the statute. Thus, although we agree with the Third Circuit's interpretation of the Hobbs Act,[17] we

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[17] The Hobbs Act, 18 U.S.C. § 1951, which punishes obstruction of interstate commerce through extortionate means, does not require that the defendant profit economically from the extortion. *See Town of West Hartford v. Operation Rescue*, 915 F.2d 92, 102 (2d Cir. 1990); *United States v. Anderson*, 716 F.2d 446 (7th Cir. 1983) (defendant kidnapped and threatened to kill physician unless he agreed to cease performing abortions violated Act); *United States v. Starks*, 515 F.2d 112 (3d Cir. 1975) ("solicitations" for religious purposes not exempt from Hobbs Act).

decline to follow its holding that, in these circumstances involving a non-economic enterprise committing non-economic predicate acts, plaintiffs may invoke the provisions of RICO. *McMonagle*, 868 F.2d at 1349-50.

The plaintiffs argue that, even if there is an economic motive requirement, they have alleged that the defendants committed unlawful acts to raise funds. More specifically, that the defendants received contributions as a result of their extortionate acts and, that they sold materials detailing unlawful methods of closing health centers. The plaintiffs argue that it is reasonable to infer from these allegations that the defendants committed extortionate acts to raise funds. In addition, they contend that defendants' activities were economically motivated because they were aimed at increasing the plaintiffs' costs of doing business. Increasing their costs, plaintiffs argue, satisfies the economic purpose requirement. Finally, plaintiffs argue that they are entitled to prove that the defendants intended to generate financial gain by selling materials advocating criminal acts against the centers.

There are several problems with these contentions. First, it is not reasonable to infer that the purpose of the defendants' extortion is to raise funds. It is clear that the aim of the extortion is to close women's health centers, as plaintiffs have repeatedly alleged throughout their complaint. *See* Second Amended Complaint at 3, 10, 11, 13, 14, 18, etc. That reprehensible criminal and tortious conduct results incidentally in donations to support it, is more a comment on the nature of the defendants' supporters than on the purpose of the defendants' acts.

Second, none of the cases discussing an economic motive requirement adopt the plaintiffs' theory that raising the victim's costs satisfies the requirement. In fact, *Ivic* itself seems to contradict such an interpretation. In *Ivic*, victims' businesses were threatened with arson and bombing. Certainly this would increase their "costs," although the defendants' motive in that case was political coercion unrelated to the operation of the businesses. *Ivic*, 700 F.2d

at 58. The plaintiffs' argument seems to be a vestige of the "raising rivals' costs" argument raised in their antitrust claim. We do not contest that the defendants' activities had an economic effect on the plaintiffs, we simply refuse to equate that effect with the economic motive required by *Ivic* and its progeny.

Finally, selling materials advocating a particular viewpoint, even if the materials advocate illegal actions, is not a predicate racketeering activity. Therefore income derived from the sales is not income derived from racketeering activity. Moreover, unless the materials violate the "clear and present danger" test, their distribution is protected by the First Amendment. *Cf. Cantwell v. Connecticut*, 310 U.S. 296, 308 (1939):

> No one would have the hardihood to suggest that the principle of freedom of speech sanctions incitement to riot or that religious liberty connotes the privilege to exhort others to physical attack upon those belonging to another sect. When clear and present danger of riot, disorder, . . . or other immediate threat to public safety, peace, or order, appears, the power of the State to prevent or punish is obvious.

For these reasons, we find no merit in the plaintiffs' argument that they have satisfied the economic motive requirement of § 1962(c).

C. § 1962(d)

Under count four, plaintiffs charge that PLAN, PLAL, and Operation Rescue conspired to violate sections 1962(a) and (c), an offense punishable by § 1962(d). Because plaintiffs claims under sections 1962(a) and (c) fail, we find no violation of § 1962(d).

V.

In conclusion, despite the reprehensible nature of the defendants' activities, we find that they are not within the reach of the Sherman Act or RICO. Therefore, the judgment of the district court is

AFFIRMED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

JUDGMENT — WITH ORAL ARGUMENT

Date: June 29, 1992

BEFORE:

Honorable William J. Bauer, Chief Judge
Honorable Walter J. Cummings, Circuit Judge
Honorable Bruce M. Van Sickle, Senior District Judge*

No. 91-2468

NATIONAL ORGANIZATION FOR WOMEN, INCORPORATED, on behalf of itself and its women members and other women who use or may use the services of women's health centers that provide abortions, DELAWARE WOMEN'S HEALTH ORGANIZATION, INCORPORATED and SUMMIT WOMEN'S HEALTH ORGANIZATION, INCORPORATED, on behalf of themselves and all other similarly situated clinics,

Plaintiffs-Appellants,

v.

JOSEPH M. SCHEIDLER, JOHN P. RYAN, RANDALL A. TERRY, et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division
No. 86 C 7888 — James F. Holderman, Judge

* The Honorable Bruce M. Van Sickle, Senior District Judge of the United States District Court for the District of North Dakota, is sitting by designation.

This cause was heard on the record from the above mentioned District Court, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this court that the judgment of the District Court is AFFIRMED, with costs, in accordance with the decision of this court entered this date.

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

Case Number: 86 C 7888 Date: May 28, 1991

Name of Assigned Judge: James F. Holderman

Case Title: National Organization for Women, Inc., et al. v. Joseph M. Scheidler, et al.

* * * * *

DOCKET ENTRY:

* * * * *

(10) ☒ [Other docket entry:]

Enter memorandum opinion and order that defendants' motion to dismiss Count 1 and Counts 2-4 is granted. Due to lack of pendent jurisdiction, Counts 5-7 are dismissed. This cause of action is dismissed in its entirety. All pending motions, except for plaintiffs' pending motion for entry of final judgment on attorneys' fees are moot.

(12) ☒ [For further detail see ☒ order attached to the original minute order form.]

* * * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 86 C 7888

NATIONAL ORGANIZATION FOR WOMEN, INC., DELAWARE WOMEN'S HEALTH ORGANIZATION, INC., and SUMMIT WOMEN'S HEALTH ORGANIZATION, INC., et al.,

Plaintiffs,

v.

JOSEPH M. SCHEIDLER, JOHN PATRICK RYAN, RANDALL A. TERRY, ANDREW SCHOLBERG, CONRAD WOJNAR, TIMOTHY MURPHY, MONICA MIGLIORINO, VITAL-MED LABORATORIES, INC., PRO-LIFE ACTION LEAGUE, INC., PRO-LIFE DIRECT ACTION LEAGUE, INC., PROJECT LIFE, and OPERATION RESCUE,

Defendants.

MEMORANDUM OPINION AND ORDER

JAMES F. HOLDERMAN, District Judge:

Plaintiffs National Organization for Women ("NOW") and two women's health centers brought this action against various antiabortion activists, antiabortion organizations, and a pathology testing laboratory alleging that defendants conspired to drive women's health centers that perform abortions out of business through a pattern of concerted, unlawful activity in violation of the Sherman Antitrust Act, the Racketeer Influenced and Corrupt Organizations Act ("RICO"), and several pendent state claims.

In furtherance of the conspiracy, plaintiffs' second amended class action complaint alleges, *inter alia*, that

defendants threatened and intimidated clinic personnel and patients, trespassed on clinic property, invaded clinics and damaged clinic equipment, blocked ingress and egress to clinics, destroyed clinic advertising, coordinated telephone campaigns to tie up clinic lines, set up appointments under false pretenses to keep legitimate patients from making appointments, and established competing pregnancy testing and counseling facilities in the vicinities of the clinics.

Defendants Joseph Scheidler, Andrew Scholberg, Timothy Murphy, and the Pro-Life Action League, Inc. filed a motion to dismiss plaintiffs' second amended complaint for failure to state a claim upon which relief may be granted. For the reasons stated below, the motion is granted in part and denied in part.

DISCUSSION

I. COUNT I: SECTION ONE OF THE SHERMAN ANTITRUST ACT

Count I of plaintiffs' complaint alleges that defendants Scheidler, Ryan, Terry, Scholberg, Murphy, Wojnar, Migliorino, PLAL, PDAL, Operation Rescue, Project Life, and Vital-Med have restrained trade in violation of section one of the Sherman Act, 15 U.S.C. § 1. Defendants argue that the objective of their activities is "closing clinics by affecting public opinion, consumers' choices, physicians' revulsion, and legislators' votes," and "to convince others for non-economic reasons that the entire private abortion market ought to be banned, or 'decommodified.' " (Mem. in Support, pp. 13, 24.) Defendants assert that their activity "is non-economic but social, moral and political." (*Id.* at 24.)

The threshold question is whether the Sherman Act was intended to cover the conduct alleged here. Given the unique

issue presented by this case, guidance can be gleaned from an examination of United States Supreme Court cases concerning the application of antitrust laws to anti-competitive political conduct.

In *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 81 S. Ct. 523 (1961), the Supreme Court held that concerted efforts to restrain or monopolize trade in order to petition government officials are protected from antitrust liability. In *Noerr*, the defendant railroads engaged in a publicity campaign with the purpose of fostering the adoption and retention of laws that would be destructive of the trucking business. *Id.* at 527. The Court characterized the publicity campaign as political activity and held that the "proscriptions of the [Sherman] Act, tailored as they are for the business world, are not at all appropriate for application in the political arena." *Id.* at 531. The Court refused to extend the Act to regulate political activities simply because they "have a commercial impact and involve conduct that can be termed unethical." *Id.* Significantly, the Court pointed out the "essential dissimilarity" between the publicity campaign and "agreements traditionally condemned by § 1 of the [Sherman] Act." *Id.* at 529.

Noerr immunity has been most recently discussed by the Supreme Court in *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 108 S. Ct. 1931 (1988) and *F.T.C. v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 110 S. Ct. 768, 769 (1990) (hereinafter "*D.C. Lawyers*"). In *Allied Tube*, members of the steel industry packed an annual meeting of a private standard-setting association with new members solely to vote against a new type of electrical conduit that posed an economic threat to steel conduit. 108 S. Ct. at 1934-35. The Court found that the *Noerr* doctrine can immunize indirect as

well as direct petitioning of the government. *Id.* at 1938. Applying *Noerr*, the Court focused on the context and nature of the anticompetitive behavior. The Court compared the conduct at issue with conduct classically condemned by the Sherman Act. The Court denied petitioner the use of *Noerr* immunity because petitioner's activity was the type of commercial activity that has traditionally had its validity determined by the antitrust laws themselves. *Id.* at 1939. Unlike *Noerr*, the behavior was not political activity that has traditionally been regulated with extreme caution or activity that bears little if any resemblance to the combinations normally held violative of the Sherman Act. *Id.* at 1940.

The most recent Supreme Court case on *Noerr* immunity confirms the pivotal role that traditional anticompetitive conduct plays in the doctrine's application. In *D.C. Lawyers*, 110 S. Ct. 768, 769 (1990), a group of lawyers in private practice who regularly acted as court-appointed counsel for indigent defendants in District of Columbia criminal cases agreed to stop providing such representation until the District increased group members' compensation. The Court held that the agreement was a boycott that "constituted a classic restraint of trade within the meaning of Section 1 of the Sherman Act." *Id.* at 774. The horizontal agreement between the lawyers, who were in competition with one another prior to the boycott, constituted a "constriction of supply [which] is the essence of price fixing . . . [and] . . . was unquestionably a 'naked restraint' on price and output." *Id.* at 774-75. Once again, the Court's denial of *Noerr* immunity was based on its classification of the agreement as "classic" anticompetitive conduct as distinguished from political activity.

The court finds great similarity between this case and another case to which NOW was a party. *State of Missouri*

v. Nat'l Organization for Women, Inc., 620 F.2d 1301 (8th Cir. 1980), involved a convention boycott organized by NOW against all states that had not ratified the proposed Equal Rights Amendment. The court asked whether Congress intended to protect free and fair competition from political or social activities that can have the same effect upon competition as the commercial activities of a trust against a business. *Id.* at 1305. After a thorough analysis of the legislative history of the Sherman Act, the court concluded that it was anticompetitive conduct with commercial objectives that Senator Sherman had in mind as the concern of the bill, not anticompetitive conduct by noncompetitors motivated by noneconomic concerns. *Id.* at 1309. The Eighth Circuit in *State of Missouri* performed an equally thorough study of the relevant case law, the results of which confirmed the court's earlier conclusion that the Sherman Act was intended to regulate anticompetitive conduct that was financial, economic, or commercial objectives. *Id.* at 1313. The court found that, although NOW's boycott was an economic device, it was used in a non-competitive political arena in order to influence legislation and, as such, is not proscribed by the Sherman Act. *Id.* at 1315.

Similarly, a woman's right to have an abortion is a social or political issue—one of the most complex and contentious in American society today. The parties each have clear and loudly publicized views on the issue of abortion. Defendants' actions are not financially or commercially motivated. Defendants have an ultimate objective—legislation prohibiting abortions—and an intermediate goal—injury to abortion clinics. The intermediate goal is one of inflicting economic harm with the hope of achieving the ultimate objective. The intended harm to the relationships between the clinics and their customers parallels the in-

tended injury to the relationship in the *Noerr* case itself between the truckers and their customers. Since the injurious restraint is incidental to a valid effort to influence governmental action, the activity enjoys antitrust immunity even if unethical and deceptive methods have been used. *See Allied Tube*, 108 S. Ct. at 1936-37. Congress has traditionally exercised extreme caution in legislating with respect to problems relating to the conduct of political activities. *Noerr*, 81 S. Ct. at 531. All of this caution would go for naught if this court permitted an extension of the Sherman Act to regulate the activities at issue simply because those activities have a commercial impact and involve conduct that can be termed unethical. *See id.*

Furthermore, unlike traditional antitrust matters (such as the situations presented in *Allied Tube* and *D.C. Lawyers*), the activities alleged here are not between competitors.[1] *Allied Tube* concerned an agreement between competitors in the conduit industry. *D.C. Lawyers* involved an agreement between competing attorneys. Even in *Noerr*, where immunity was granted, there was an agreement between commercial competitors in the long-

[1] In paragraph two of the complaint, plaintiffs allege that the parties are competitors in commerce. Plaintiffs state that defendants "established competing pregnancy testing and counseling facilities in the vicinities of the clinics, sometimes in the same buildings where clinics are located, homes for pregnant women and, on information and belief, prenatal and delivery services, foster homes and private adoption agencies." Although Fed. R. Civ. P. 8(a) requires only "a short and plain statement of the claim," this obscure reference to commercial competition between the parties is the sole allegation in the complaint of the commercial nature of defendants' activities. As such, it does not constitute the "plain" statement necessary to provide notice and state a claim for relief under the Sherman Act.

distance freight hauling business. Here, as in *State of Missouri*, none of the parties are commercial competitors. The "essential dissimilarity" between the alleged conduct and the conduct traditionally regulated by antitrust laws is of a greater magnitude in this case than that in *Noerr* itself. Thus, the Supreme Court's reasons in *Noerr* for not applying antitrust laws apply with greater weight to this case, which involves political opponents, not commercial competitors, and political objectives, not marketplace goals.

For these reasons, the Court finds that the Sherman Act does not apply to the defendants' anticompetitive actions alleged in the complaint. Accordingly, Count I must be dismissed.

II. RICO COUNTS

A. SECTION 1962(a)

Count II of plaintiffs' complaint alleges a violation of 18 U.S.C. § 1962(a), which makes it

> unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity . . . to use or invest, directly or indirectly, any part of such income or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise. . . .

Plaintiffs allege that defendants received contributions in support of their racketeering activities and that defendants invested that income in the various defendant organizations to further the illegal goals of the organizations. (Complaint, ¶¶ 100-104).

In order to state a claim under § 1962(a), income must be "derived, directly or indirectly, from a pattern of racketeering activity." Plaintiffs claim that the donations re-

ceived from defendants' supporters were derived from defendants' illegal acts. Plaintiffs state that "[i]t is well-known that the more outrageous and highly-publicized the activities are, the more likely the RICO Defendants and the enterprises are to receive large donations." (RICO Case Statement, p. 22.) The court believes that the receipt of donations from supporters of the defendant organizations does not constitute income derived from a pattern of racketeering activity. The racketeering activity alleged in the complaint is extortion. The extortion was addressed, either directly or indirectly, at clinics and employees and patients of those clinics. Supporters of defendant organizations were not extorted, either directly or indirectly, into contributing to the organizations. While supporters may have contributed in order to promote the extortionate activities of defendants, their contributions in no way were derived from the pattern of racketeering alleged in the complaint. *See Hemmings v. Barian*, 822 F.2d 688, 692 (7th Cir. 1987) (§ 1962(a) claim fails because the income received was not derived from the racketeering activity alleged in the complaint, but instead was income from sources that were proper and aboveboard). Thus, plaintiffs' RICO claim under § 1962(a) must fail.

B. SECTION 1962(c)

Count III of plaintiffs' complaint alleges a violation of 18 U.S.C. § 1962(c). A violation of § 1962(c) requires (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity. *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 105 S. Ct. 3275, 3285 (1985). In addition, the plaintiff only has standing if, and can only recover to the extent that, he has been injured in his business or property by the conduct constituting the violation of § 1962(c). *Id.*

Defendants contend that RICO requires that the predicate acts or the enterprise be economically motivated. The circuits which have explicitly addressed this issue are in conflict on the need for an economic motive. As noted by Justice White, the Second and Eighth Circuits require a profit-making element, while the Third Circuit does not. *McMonagle v. Northeast Women's Center, Inc.*, 110 S. Ct. 261 (1989) (denial of petition for writ of certiorari) (White, J., dissenting).

The Second Circuit has held that either the predicate acts of racketeering or the enterprise must have some financial motive. *United States v. Ferguson*, 758 F.2d 843, 853 (2d Cir. 1985); *United States v. Bagaric*, 706 F.2d 42, 55 (2d Cir. 1983); *United States v. Ivic*, 700 F.2d 51, 65 (2d Cir. 1983). However, the economic motive need not surmount all other motives.

In *Ivic*, the Second Circuit held that subsection 1962(c) has an economic motive requirement. *Id.* at 60. The court discussed the use of the term "enterprise" in 1962(a) and (b),[2] concluding that "the term 'enterprise' [in subsections (a) and (b)] quite clearly refers to . . . the sort of entity which one joins to make money. . . . [A]n 'enterprise', as used in these subsections, is evidently an organized profit-seeking venture." *Id.* The court adhered to the rule that when the same word is used in the same section of an act more than once, and the meaning is clear in one place, it will be assumed to have the same meaning in

[2] Section 1962(a) makes it unlawful to use funds derived from a pattern of racketeering or from the collection of an unlawful debt to acquire an interest in or to establish or operate an enterprise engaged in or affecting interstate or foreign commerce. Section 1962(b) makes it unlawful to acquire or maintain an interest in or control of an interstate enterprise through a pattern of racketeering activity or through collection of an unlawful debt.

other places. *Id.* Thus, the court found a requirement for a profit-generating motive in subsection (c).

The Eighth Circuit has also held that an enterprise must be directed toward an economic goal. *United States v. Flynn*, 852 F.2d 1045, 1052 (8th Cir. 1988); *United States v. Anderson*, 626 F.2d 1358, 1372 (8th Cir. 1980). In *Anderson*, the Eighth Circuit stated:

> We hold that Congress intended the phrase 'a group of individual's associated in fact although not a legal entity,' as used in its definition of the term 'enterprise' in section 1961(4), to encompass only an association having an ascertainable structure *which exists for the purpose of maintaining operations directed toward an economic goal* that has an existence that can be defined a part from the commission of the predicate acts constituting the 'pattern of racketeering.'

Anderson, 626 F.2d at 1372 (emphasis added). The court in *Anderson* set forth this economic goal requirement as part of its discussion of a distinct enterprise requirement. Although the court did not fully explain the reason for the economic goal requirement, the court earlier determined that, as the Second Circuit did in *Ivic*, the meaning of "enterprise" in subsection 1962(c) is the same as in subsections 1962(a) and (b). *Id.* at 1366 n.12.

In *Flynn*, the Eighth Circuit was directly faced with the issue of an economic motive requirement in RICO. The court relied on *Anderson* and *Ivic* when it held that an enterprise must be directed toward an economic goal. *Flynn*, 852 F.2d at 1052. In finding this requirement met, the court noted that the members of the enterprise directed their activities toward controlling St. Louis labor unions, thereby enhancing their own finances and influence. *Id.*

In *Northeast Women's Center, Inc. v. McMonagle*, 868 F.2d 1342 (3d Cir. 1989), the Third Circuit focused on the need for an economic motive in a RICO claim that was predicated on violations of the Hobbs Act. In *McMonagle*, a women's health center brought a RICO action against antiabortionist activities for intimidation and harassment of the center's employees and activities. The court held that since no economic motive is necessary under the Hobbs Act, no economic motive is required when the Hobbs Act is used as a predicate under RICO. *Id.* at 1350. Thus, the Third Circuit avoided the question of whether an economic motive was required under the RICO statute itself.

The Seventh Circuit has not directly addressed the issue of an economic motive requirement in RICO. However, in *United States v. Neapolitan*, 791 F.2d 489, 500 (7th Cir. 1986), the Seventh Circuit adopted the Eighth Circuit's definition of "enterprise" found in *Anderson*.[3] Two district judges of the Northern District of Illinois in published opinions have also adopted the *Anderson* definition of enterprise. *See Uniroyal Goodrich Tire Co. v. Mutual Trading Corp.*, 749 F. Supp. 869, 877 (N.D. Ill. 1990) (Aspen, J.); *United States v. Walters*, 711 F. Supp. 1435, 1448 (N.D. Ill. 1989) (Marovich, J.).

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[3] This court recognizes that the Seventh Circuit in *Neapolitan* was discussing the requirement for the existence of a RICO enterprise separate from a RICO conspiracy, and was not directly addressing the existence of an economic motive requirement. However, by adopting the definition of "enterprise" from *Anderson in toto*, the Seventh Circuit appears to have approved the requirement that a RICO "enterprise" must exist "for the purpose of maintaining operations directed toward an economic goal." 791 F.2d at 500.

In light of the reasoned opinions of the Second Circuit concerning the RICO economic motive requirement, the similar holding of the Eighth Circuit, the questionable reasoning by the Third Circuit, and the Seventh Circuit's apparent adoption of the economically-motivated "enterprise" definition, this court holds that an economic motive requirement exists to the extent that some profit-generating purpose must be alleged in order to state a RICO claim.[4]

The Second Circuit's opinions in *Ivic*, *Bagaric*, and *Ferguson* provide three different factual situations which demonstrate the Second Circuit's application of the economic motive requirement. In *Ivic*, defendants were Croation activists who were committed to achieving independence for their homeland. *Ivic*, 700 F.2d at 53. The indictment charged that the "primary object" of the criminal

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[4] Plaintiffs assert that defendants' "activities have decreased the business of, and/or increased the cost of doing business at . . . clinics." (Complaint, ¶ 105.) The business injuries include increased cost for laboratory services, increased insurance costs for clinics, increased costs for security guards, increased costs for rental space, lost business, and general harassment. (RICO Case Statement, ¶15.) The three cases from the Second Circuit and the two cases from the Eighth Circuit discussed herein approach the economic motive requirement as whether the enterprise or pattern of racketeering was profit-generating, and not whether they were cost-enhancing. In fact, the Second Circuit's opinion in *Ivic*, relied on by the Eighth Circuit in *Flynn*, clearly states that a RICO enterprise "is evidently an organized profit-seeking venture." *Ivic*, 700 F.2d at 60. In finding that the government had not met the economic motive requirement, the court determined that the "[d]efendants joined together not to make money." *Id.* No case applying the RICO economic motive requirement has discussed an increase in costs incurred by a plaintiff resulting from a defendant's conduct as a way to meet the requirement. Therefore, this court interprets the economic purpose requirement as an intent by the defendant to generate financial gain for the defendant, and not as an intent by the defendant to increase costs incurred by the plaintiff.

enterprise was to "use terror, assassination, bombings, and violence in order to foster and promote their beliefs and in order to eradicate and injure persons whom they perceived as in opposition to their beliefs." *Id.* at 58.

When the court applied the economic motive requirement to the facts, the court found the requirement unmet:

> Defendants joined together not to make money but . . . to advance the goal of Croatian independence. They undertook to murder Badurina and to bomb the dance studio and the travel agency not to obtain money, but rather to eliminate political opponents, win publicity, or otherwise further their chosen cause.

Id. at 60-61. In a footnote, the court distinguished these facts from cases where terrorist organizations have engaged in robbery or extortion to obtain money to further their activities. *Id.* at 61 n.6.

In *Bagaric*, the government charged members of a Croatian terrorist group with the predicate acts of extorting money from unsympathetic Croatians in order to provide financial support for their other illegal activities. *Bagaric*, 707 F.2d at 46-52. The court found that the predicate acts were "classic economic crime[s]" that "were carried out either to compel payment or in retaliation for refusal to meet appellants' extortionate demands." *Id.* at 58. The government's case involved the extortion of money from "moderate Croatians" to help finance defendants' criminal enterprise. *Id.*

Similarly, in *Ferguson*, the Second Circuit allowed a RICO prosecution against members of the Black Liberation Army who were charged with predicate acts including armored truck robberies and the use of stolen money to maintain safe houses and to support members of the group. *Ferguson*, 758 F.2d at 853. The court emphasized

that, unlike *Ivic*, "the defendants' activities centered around the commission of economic crimes" including ten robberies and attempted robberies of armored trucks in order to obtain money to further their activities. *Id.*

Of the three Second Circuit cases, the instant case is most analogous to *Ivic*. According to plaintiffs' pleadings, the primary objective of the alleged enterprise and its pattern of predicate acts was to drive clinics that perform abortions out of business.[5] While plaintiffs do allege that defendants received monetary benefits from the enterprise in the form of voluntary donations from supporters, this does not meet the level of economic motivation set out by the Second Circuit. In both *Bagaric* and *Ferguson*, the court found that "some financial purpose" existed. The court reasonably labeled the predicate acts of extortion of money, in *Bagaric*, and armored truck robberies, in *Ferguson*, as "economic crimes." In both of these cases, the predicate acts were crimes in which the necessary goal was to obtain money. The money was then to be used to further the central activities of the enterprise.

Here, defendants alleged acts were directed, as in *Ivic*, toward "eradicat[ing] and injur[ing] persons whom they perceived as in opposition to their beliefs." *See Ivic*, 700 F.2d at 58. The motivation for destroying clinic property, threatening clinic employees, and blocking access to clinics, among other alleged acts, was not to obtain money, but rather to otherwise further their antiabortion cause by

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[5] *See, e.g.*, Second Amended Complaint, ¶¶ 1, 3, 26, 27, 28, 29, 30, 96; RICO Case Statement, ¶ 2, 3, 5(f)(2), 5(g), 8. As stated in the RICO Case Statement, "[t]he predicate acts . . . are related in that they have been organized and executed . . . to further the enterprises' goal of closing through extortionate acts, all women's health centers that provide abortion services." (¶ 5(g).)

limiting the availability of abortion services and winning publicity for their cause. The fact that such activity may have also resulted in an increase in voluntary donations to the enterprise is not sufficient to allege the economic motivation requirement of RICO.

The economic motive requirement would lose all meaning should the courts consider an enterprise to be economically motivated solely because that enterprise happens to receive voluntary donations to support the continuation of racketeering activities directed toward a nonfinancial objective. If this were the case, a plaintiff in a RICO action could meet the economic motive requirement simply by alleging that the defendant sought to receive some voluntary financial support from bystanders harboring sympathy for the defendant's pattern of racketeering activities and that the defendant was motivated by the possibility of gaining financially from the voluntary contributions of those sympathizers during the course of the activities. This result is nonsensical, and the court refuses to adopt it.

C. SECTION 1962(d)

Count IV alleges a RICO claim under 1962(d). Section 1962(d) makes it "unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section." Since plaintiffs' claims under sections 1962(a) and (c) cannot stand, plaintiffs' section 1962(d) claim must also fail.

III. PENDENT STATE CLAIM

Having dismissed the federal claims in plaintiffs' complaint, all that remains are pendent state law claims. The

general rule is that the court should relinquish jurisdiction over any pendent state law claim when the federal claims are dismissed before trial. *United Mine Workers v. Gibbs*, 383 U.S. 715, 86 S. Ct. 1130, 1139, 16 L.Ed.2d 218 (1966). Accordingly, the court dismisses the pendent state claims.

CONCLUSION

For these reasons, defendants' motion to dismiss Count I (under the Sherman Act) and Counts II-IV (under RICO) of plaintiffs' second amended class action complaint is GRANTED. Due to lack of pendent jurisdiction, Counts V-VII of the complaint are DISMISSED. This case is dismissed in its entirety. All pending motions, except for plaintiffs' pending motion to enter final judgment on attorneys' fees, are moot.

ENTER:

JAMES F. HOLDERMAN
JAMES F. HOLDERMAN
United States District Judge

DATED: May 28, 1991

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JUDGMENT IN A CIVIL CASE

NATIONAL ORGANIZATION FOR WOMEN, INC., et al.,
Plaintiffs,

v.

JOSEPH M. SCHEIDLER, et al.,
Defendants.

CASE NUMBER 86 C 7888

☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ Decision by Court. This action came to hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that motion to dismiss Counts I and II-IV of the second amended class action complaint is granted. Due to lack of pendent jurisdiction, Counts V-VII are dismissed. This cause of action is dismissed in its entirety. All pending motions, except for plaintiffs' motion for entry of final judgment on attorneys' fees, are moot.

There being no just reason for delay, this is a final and appealable order.

May 28, 1991
Date

/s/ H. STUART CUNNINGHAM
Clerk

/s/ KATHLEEN BRANCH
(By) Deputy Clerk

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Case Number: 86 C 7888 Date: July 31, 1990

Name of Assigned Judge: JAMES F. HOLDERMAN

Case Title: N.O.W. v. Scheidler

MOTION:

Vital-Med Motion to Dismiss Counts I and VII of Second Amended Complaint

DOCKET ENTRY:

(1) ☐ Judgment is entered as follows:

(2) ☒ [Other docket entry:]

Vital-Med's motion to dismiss Counts I and VII of Second Amended Complaint is DENIED.

* * * * *

(12) ☒ (For further detail see ☒ order on the reverse of the original minute order form.)

* * * * *

86 C 7888

Vital-Med has moved pursuant to Fed. R. Civ. P. 12(b)(6) to dismiss Counts I and VII of plaintiffs' Second Amended Complaint.

Count I asserts a violation of section one of the Sherman Anti-Trust Act, 15 U.S.C. § 1, by reason of an alleged agreement among Vital-Med and the PLAN defendants to restrain trade. The alleged agreement, the pleading alleges, was entered into for the purpose of forcing women's health centers that provide abortions out of business. (Complaint, ¶ 86.)

Count VII of plaintiffs' pleading alleges that Vital-Med owed a duty of confidentiality to the plaintiff clinics and the women whose fetal specimens were sent to Vital-Med for pathology testing and disposal. (Complaint, ¶ 131.) Vital-Med's duty allegedly was breached when it failed (1) to establish any security procedures to ensure that the identity of women having abortions would remain confidential; and (2) when it failed to ensure proper sanitary disposal of the remains. (Id.)

Vital-Med's motion is denied.

As the court has ruled previously, the court believes that plaintiffs have adequately alleged an antitrust violation. Vital-Med's arguments with regard to, *e.g.*, the existence (or lack thereof) of anticompetitive effect and respondeat superior liability are best presented in the context of a summary judgment motion.

The court also concludes that Count VII states a cause of action. It is unclear from the Complaint whether Count VII sounds in contract or tort. In their memorandum in opposition to Vital-Med's motion, plaintiffs assert that Vital-Med owed a contractual duty to keep patient information confidential and provide the laboratory results only to the clinics. (*See* Plaintiffs' Mem. in Opposition to Vital-Med's Motion to Dismiss, p. 21.) The court also believes that if Vital-Med's services were necessary to the care offered to patients by the physicians associated with the plaintiff clinics, then the statutory duty of Ill. Rev. Stat. ch. 110, § 8-802 owed by the physicians to those patients was also owed by Vital-Med. The court believes, moreover, that the plaintiff clinics have standing to assert the

violation of the privilege. *Cf. Parkson v. Central DuPage Hospital*, 105 Ill. App. 3d 850, 61 Ill. Dec. 651, 653 (1st Dist. 1982) (hospitals had standing to assert physician-patient privilege on behalf of non-plaintiff patients to bar production of their medical records when neither patients nor treating physicians were parties to suit).

Accordingly, Vital-Med's motion to dismiss is DENIED. Vital-Med shall file an Answer to the Second Amended Complaint on or before August 17, 1990.

APPENDIX D

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Case Number: 86 C 7888 Date: April 23, 1990

Name of Assigned Judge: JAMES F. HOLDERMAN

Case Title: N.O.W. v. Scheidler, et al.

* * * * *

DOCKET ENTRY:

(1) ☐ Judgment is entered as follows:

(2) ☒ [Other docket entry:]

Defendant Wojnar's motion to dismiss the amended complaint is denied. Responsive pleading is due May 7, 1990. Status hearing is set for May 17, 1990 at 10:00 a.m.

* * * * *

(12) ☒ (For further detail see ☒ order on the reverse of the original minute form.)

* * * * *

86 C 7888

Mr. Wojnar has moved the court pursuant to Fed. R. Civ. P. 12(b)(6) to dismiss him from counts I and V of the amended complaint on the ground that those counts fail to state a claim upon which relief can be granted. Mr. Wojnar contends (1) that the allegations of the complaint fail to allege either an antitrust violation or a tort cognizable under Illinois law; and (2) that his activities are

protected under the First and Fourteenth Amendments. More particularly, Mr. Wojnar asserts that he is immune from suit under the doctrine established by *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 81 S. Ct. 523 (1961) ("*Noerr*") and further defined in *N.A.A.C.P. v. Claiborne Hardware Co.*, 458 U.S. 886, 102 S. Ct. 3409 (1982).

The amended complaint (the allegations of which the court assumes for purposes of this motion to be true) alleges that Mr. Wojnar runs a number of anti-abortion women's medical clinics in the Chicago area and is the director of the Des Plaines Pro-Life Women's Center. (¶ 14.) Mr. Wojnar is alleged to have participated in a conspiracy to steal approximately 4,000 specimens of fetal remains from Vital-Med, a research laboratory which, at least formerly, conducted pathology testing for some of the plaintiffs. (¶¶ 65-69.) Vital-Med has notified these plaintiffs that it will no longer accept fetal specimens from the clinics for analysis. (¶ 77.) The complaint alleges that Mr. Wojnar's activities were intended to have, and indeed have had, an anti-competitive effect and threaten to restrain interstate trade. (¶¶ 82-83.) His activities are also alleged to have tortiously interfered with the plaintiff clinics' business relationship with Vital-Med. (¶¶ 116-123.)

In *N.A.A.C.P. v. Claiborne Hardware*, the Supreme Court held that the First Amendment protected the "peaceful political activity" (102 S. Ct. at 3425) of certain boycotters of white merchants, the objective of which was to vindicate "rights of equality and freedom lying at the heart of the Constitution . . ." (*Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 108 S. Ct. 1931, 1941 (1988)). In both *Claiborne Hardware* and in *Noerr* the Supreme Court held that antitrust immunity attached because a major purpose of the challenged activity was to influence governmental action. *See Claiborne Hardware*, 102 S. Ct. at 3425-26.

Since, according to the allegations of the complaint, many of Mr. Wojnar's alleged activities were far from

peaceful, and because no showing has been made that a major purpose of the alleged activity was to either influence governmental action or secure long-established rights protected by the Constitution, the court must find at least at this point that *Noerr* immunity does not offer Mr. Wojnar any protection. The amended complaint, interpreted most favorably to the plaintiffs, states that Mr. Wojnar's activities were at least partially, if not primarily, intended to cause the clinics severe economic harm and lessen competition by putting them out of business. Accordingly, Mr. Wojnar's motion to dismiss is DENIED.

APPENDIX E

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Case Number: 86 C 7888 Date: October 1, 1987

Name of Assigned Judge: James F. Holderman

Case Title: National Organization for Women, Inc., et al. v. Joseph M. Scheidler, et al.

* * * * *

DOCKET ENTRY:

(1) ☐ Judgment is entered as follows:

(2) ☒ [Other docket entry:]

Defendants' motion to reconsider is denied. Defendants' motion for certification under 1292(b) is denied.

Status hearing is set for October 27, 1987 at 10:00 a.m.

* * * * *

(12) ☒ [For further detail see ☒ order on the reverse of the original minute order form.]

* * * * *

ORDER

On July 2, 1987 this court denied defendants' Motion to Dismiss. Before the court is defendants' motions (1) to reconsider and (2) for certification under 28 U.S.C. §1292(b) of this court's July 2, 1987 decision.

Defendants in their motion to reconsider do not raise new issues or present new evidence. This court continues to hold that under *Conley v. Gibson*, 355 U.S. 41 (1957) and *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101 (7th Cir. 1984) plaintiffs have sufficiently pled a conspiracy in restraint of trade within the meaning of the Sherman Act. Defendants' Motion to Reconsider is therefore denied.

This court also denies defendants' motion for §1292(b) certification of this court's July 2, 1987 decision. Plaintiffs have not persuaded this court that an immediate appeal from this court's July 2, 1987 order may "materially advance the ultimate termination of the litigation." Plaintiffs represent that they can be ready for trial in six months. An appeal would end this litigation only if it resulted in a reversal and would, in any event, surely take longer than six months.

APPENDIX F

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Case Number: 86 C 7888 Date: July 2, 1987

Name of Assigned Judge: James F. Holderman

Case Title: National Organization for Women, Inc., et al. v. Joseph M. Scheidler

* * * * *

DOCKET ENTRY:

(1) ☐ Judgment is entered as follows:

(2) ☒ [Other docket entry:]

Defendants' motion to dismiss is denied. Status hearing is set for July 15, 1987 at 10:00 a.m.

* * * * *

(12) ☒ [For further detail see ☒ order on the reverse of the original minute order form.]

* * * * *

ORDER

On October 17, 1986 the National Organization for Women (NOW), the Delaware Women's Health Organization (DWHO) and the Ladies Center of Pensacola (Ladies Center) filed this action against Joseph Scheidler, John Patrick Ryan and two anti-abortion organizations. Plaintiffs charge that defendants violated section one of the

Sherman Act, 15 U.S.C. § 1 by combining to shut down abortion clinics. Plaintiffs seek injunctive and declaratory relief.

Before the court is defendants' motion to dismiss under Federal Rules 12(b)(1) and 12(b)(6).

A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Conley v. Gibson*, 355 U.S. 41, 45-6 (1957). When evaluating a motion to dismiss, a court accepts the plaintiff's allegations as true and draws reasonable fact inferences in his favor.

A complaint should not be dismissed for want of subject matter jurisdiction unless the claims are "so insubstantial, implausible, foreclosed by prior decisions or otherwise so completely devoid of merit so as not to involve a federal controversy within the jurisdiction of the District Court." *Oneida Indian Nation v. County of Oneida*, 414 U.S. 66, 666-7 (1974).

Applying the above liberal standards, this court cannot dismiss plaintiffs' complaint. Plaintiffs may be able to show that (1) they suffered antitrust injury; (2) they have standing; (3) defendants substantially affected interstate commerce; and (4) defendants' actions are within the Sherman Act.

Defendants' motion to dismiss is DENIED.

APPENDIX G

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

August 4, 1992.

Before

Hon. WILLIAM J. BAUER, Chief Judge
Hon. WALTER J. CUMMINGS, Circuit Judge
Hon. BRUCE M. VAN SICKLE, Senior District Judge[1]

NATIONAL ORGANIZATION FOR WOMEN, INC., on behalf of itself and its women members and other women who use or may use the services of women's health centers that provide abortions, DELAWARE WOMEN'S HEALTH ORGANIZATION, INCORPORATED and SUMMIT WOMEN'S HEALTH ORGANIZATION, INCORPORATED, on behalf of themselves and all other similarly-situated clinics,

Plaintiffs-Appellants,

No. 91-2468 *v.*

JOSEPH M. SCHEIDLER, JOHN P. RYAN, RANDALL A. TERRY, ANDREW SCHOLBERG, CONRAD WOJNAR, TIMOTHY MURPHY, MONICA MIGLIORINO, VITAL-MED LABORATORIES, INC., PRO-LIFE ACTION LEAGUE, INC., PRO-LIFE DIRECT ACTION LEAGUE, INC., PROJECT LIFE, and OPERATION RESCUE,

Defendants-Appellees.

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[1] The Honorable Bruce M. Van Sickle, Senior Judge of the United States District Court for the District of North Dakota, is sitting by designation.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division
No. 86 C 7888 — James F. Holderman, Judge

ORDER

On consideration of the petition for rehearing and suggestion for rehearing en banc filed in the above-entitled cause by plaintiffs-appellants, no judge in active service has requested a vote thereon,[2] and all of the judges on the original panel have voted to deny the petition for rehearing and suggestion for rehearing en banc.

Accordingly, it is hereby ordered that the aforesaid petition for rehearing and suggestion for rehearing en banc be and the same is hereby DENIED.

[2] The Honorable Kenneth F. Ripple, did not participate in the consideration of the suggestion for rehearing en banc.